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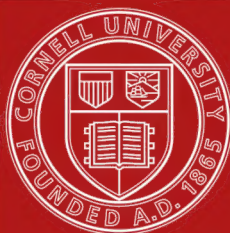
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A
SELECTION OF CASES
ON
THE CONFLICT OF LAWS

BY
JOSEPH HENRY BEALE, JR.
PROFESSOR OF LAW IN HARVARD UNIVERSITY

IN TWO VOLUMES

VOL. II

CAMBRIDGE
HARVARD UNIVERSITY PRESS

32797

CHAPTER VIII.

INHERITANCE.

SECTION I.

INTESTATE SUCCESSION.

LAWRENCE v. KITTERIDGE.

* SUPREME COURT OF ERRORS, CONNECTICUT. 1852.

[*Reported 21 Connecticut, 576.*]

CHURCH, C. J.¹ The first decree of the Court of Probate appealed from was predicated upon facts essentially as follows, viz., Cephas Pettibone, the intestate, at the time of his death, was an inhabitant of, and had his domicile in, the State of Vermont, and was possessed of an estate there; and there was due to him here, from a citizen of this State, a debt of about one thousand dollars. Original administration upon his estate was granted in the State of Vermont, and was in progress when an ancillary administration was granted in this State. When the decree appealed from was made, there were no unsatisfied debts due from the estate here, or in Vermont, and nothing but a distribution of the estate remained to be done.

The intestate died, leaving brothers and sisters of the whole and half blood; all, excepting the late Augustus Pettibone, Esq., of Norfolk, who was a brother of the whole blood, residing in Vermont, or elsewhere, out of this State; and he had no other heirs at law. By the laws of Vermont, the brothers and sisters of an intestate of the whole and half blood are entitled equally to the estate, under the statute of distribution.

Upon the foregoing state of facts, the Court of Probate for the District of Norfolk was of opinion that the personal estate of Cephas Pettibone — the chose in action of one thousand dollars — should be distributed according to the laws of the State of Vermont; and that this could better be done, and without injury to any citizen of this State, by transmitting the money to the administrator there, and to the jurisdiction of the Court of Principal Administration, than to order:

¹ Part of the opinion only is given. — ED.

a distribution of it here. And therefore the decree appealed from was made.

The appellant, who is the representative of Augustus Pettibone, the brother of the whole blood residing in the District of Norfolk, objects to this decree, and appeals from it. He claims that the assets or money in the hands of the administrator here should have been distributed here, and according to the laws of this State, which prefer a brother or sister of the whole blood to one of the half blood.

1. We had supposed that the law of the country of the domicile of an intestate governed and regulated the distribution of his personal estate; and that this was a principle of international law, long ago recognized by jurists in all enlightened governments, and especially recognized by this court in the recent case of *Holcomb v. Phelps*, 16 Conn. R. 127, 133, in which we say that "It certainly is now a settled principle of international law, that personal property shall be subject to that law which governs the person of the owner, and that the distribution of and succession to personal property, wherever situated, is to be governed by the laws of that country where the owner or intestate had his domicile at the time of his death." *Sto. Conf. Laws*, 403, *in notis*, §§ 480, 465; 2 *Kent's Com.*, Lect. 37; 2 *Kaine's Prin. Eq.*, 312, 826; *Potter v. Brown*, 5 *East*, 124; *Balfour v. Scott*, 6 *Bro. Parl. Cas.* 550 (*Toml. ed.*); *Bempde v. Johnstone*, 2 *Ves.* 198; *Pepon v. Pepon*, *Amb.* 25, 415; *Guier v. O'Daniel*, 1 *Binn.* 349, *in notis*; *Harvey v. Richards*, 1 *Mason*, 381.

It is not necessary that we should now examine the reasons, whether of public policy or legal propriety, which have led the tribunals of civilized nations to relax from antiquated notions on this subject; some of these are well considered by Judge Story, in the case of *Harvey v. Richards*, 1 *Mason*, 381, and by Chancellor Kent, in his *Commentaries*, vol. 2, Lect. 37.

It is true that it is in the power of every sovereignty, and within the constitutional powers of the States of this Union, to repudiate this salutary doctrine in its application to themselves, or to modify it for what they may suppose to be the protection of their own citizens; but without some peculiar necessity, it cannot be supposed that any well-regulated government will do it. It was claimed in argument, in this case, that this had been done in this State, and by the provision of the 49th section of our statute for the settlement of estates (Stat. 357), by declaring that when there are no children, etc., of an intestate, his "real and personal estate shall be set off equally to the brothers and sisters of the whole blood." But it was not the purpose of this provision to disregard the universal and salutary doctrines of the law to which we have referred, but only to regulate the descent and distribution of the estate of our own citizens. This provision of our statute is not peculiar to ourselves; a similar one, we presume, may be found in the codes of other States; at least, imperative enactments exist in every State, directing the distribution of estates; but none of them are intended to

repeal the law of the domicil in its effect upon the personal estate of the owner. The controversy in the case of *Holcomb v. Phelps* arose under the same section of our law as does the one now under consideration, and the result of that case must settle this question, if it be one.

There are cases in which the law of the domicil has been modified or restrained, in its full operation, for what courts have supposed to be the proper protection of the rights of the citizens of their own States; but these are generally confined to cases in which creditors are in some way interested under insolvent proceedings, assignments, or bankrupt laws, and never, we believe, are extended to mere cases of distribution, as here claimed. *Sto. Conf. L.*, 277, § 337.¹

LYNCH v. PROVISIONAL GOVERNMENT OF PARAGUAY.

COURT OF PROBATE. 1871.

[*Reported Law Reports*, 2 *Probate and Divorce*, 268.]

THE plaintiff claimed probate (as universal legatee) of the will of Francisco Solano Lopez, who died at Paraguay on the 1st of March, 1870. A caveat having been entered by the defendants, they were called upon to propound their interest, and they accordingly filed the following declaration:—

“1. That Francisco Solano Lopez, the deceased in this cause, was a native of Paraguay, and at the time of his death, which took place in Paraguay, on or about the 1st day of March, 1870, was domiciled there.

“2. That by the law of nations, and by the law of England, the succession to the personal estate and effects of the said deceased, wheresoever situate, and also the right to administer to the said estate, is to be governed by the law of Paraguay.

“3. That by a decree of the Government of Paraguay, dated the 4th day of May, 1870, all the property of said deceased, wheresoever situate, is declared to be the property of the nation of Paraguay, and that such decree is valid and now binding and operative by the law of Paraguay.

¹ *Acc. Somerville v. Lord Somerville*, 5 Ves. 749, 786; *Dogliani v. Crispin*, L. R. 1 H. L. 301; *Hewitt v. Cox*, 55 Ark. 225, 17 S. W. 873; *Estate of Apple*, 66 Cal. 432; *In re Afflick*, 3 McArth. 95; *Russell v. Madden*, 95 Ill. 485; *Lewis's Estate*, 32 La. Ann. 385; *Hairston v. Hairston*, 27 Miss. 704; *White v. Tennant*, 31 W. Va. 790, 8 S. E. 596. But see *Succession of Petit*, 49 La. Ann. 625, 21 So. 717. *Contra*, by statute, *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61.

So the widow's allowance is to be governed by the law of her husband's domicil at death. *Mitchell v. Ward*, 64 Ga. 208.—Ed.

"4. That by the now existing law of Paraguay, no will or testamentary paper whatsoever of the said Francisco Solano Lopez is entitled to probate, or has any validity whatsoever in England or elsewhere.

"5. That by the now existing law of Paraguay, the said Government of Paraguay, or their officer, or attorney, is entitled to become the sole personal representative in England of the said deceased, and to take the grant of letters of administration in England of his personal estate and effects situate in England.

"6. That Richard Lees, the defendant, is by a power of attorney, duly executed by the President of the Republic of Paraguay on behalf of the said republic, dated the 22d day of December, 1870, duly authorized to oppose the grant of probate of any testamentary document of the said deceased, and the grant of any letters of administration of the estate of the said deceased, to any other person, and to apply for letters of administration of all the personal estate and effects of the said deceased situate in England, to be granted to him under such power of attorney, and that he is by reason of the premises the only person entitled to be constituted the personal representative of the said deceased in England."

To this declaration the plaintiff demurred, and the demurrer came on for argument on the 4th of May, 1871.¹

LORD PENZANCE, having stated the declaration, said: To this declaration the plaintiff has demurred, and the ground of demurrer relied upon is, that the decree upon which the defendants' claim is based is not alleged to have been in force at the date of the testator's death. Some other points were taken in argument raising a discussion of considerable interest; but, on reflection, I am satisfied that the date of the decree relied upon by the defendants is fatal to their claim in this suit. The general proposition that the succession to personal property in England of a person dying domiciled abroad is governed exclusively by the law of the actual domicil of the deceased was not denied; but it was affirmed by the plaintiff that this proposition had relation only to the law of the domicil as it existed at the time of the death of the individual in question, and that no changes made in that law after the date of the death can by the law of this country be recognized as affecting the distribution of personal property in England. This contention appears to me well founded. A general statement of the rule of law on this head is to be found in § 481 of Story's Conflict of Laws. He says: "The universal doctrine now recognized by the common law, although formerly much contested, is, that the succession to personal property is governed exclusively by the law of the actual domicil of the intestate at the time of his death." The words "at the time of his death" are here carefully inserted as part of the principal proposition, and a long list of authorities is cited in support of that proposition, in none of which is any passage to be found indicating that those words are not a necessary part of it. But it was ingeniously

¹ Arguments of counsel are omitted. — ED.

argued that the decree in question has by the law of Paraguay a retrospective operation, and that, though the decree was, in fact, made since the death, it has by the law of Paraguay become part of that law at the time of the death. In illustration of this view it was suggested, that if the question were to arise in a court of Paraguay such court would be bound by the decree, and therefore bound to declare the provisions of the decree to be effective at and from the time of the death. This may be so; but the question is, whether the English courts are bound in like manner; or, more properly speaking, the question is, in what sense does the English law adopt the law of the domicile? Does it adopt the law of the domicile as it stands at the time of the death, or does it undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law? No authority has been cited for this latter proposition, and in principle it appears both inconvenient and unjust. Inconvenient, for letters of administration or probate might be granted in this country which this court might afterwards be called upon, in conformity with the change of law in the foreign country, to revoke. Unjust, for those entitled to the succession might, before any change, have acted directly or indirectly upon the existing state of things, and find their interests seriously compromised by the altered law. As, therefore, I can find no warrant in authority or principle for a more extended proposition, I must hold myself limited to the adoption and application of this proposition, that the law of the place of domicile as it existed at the time of the death ought to regulate the succession to the deceased in this case. Under that law the present defendants have no *locus standi* to oppose any will the testator may have made, and no concern with his estate. The demurrer must therefore prevail.

I will only further observe, that if the decree upon which the defendants rely is one entitled to be recognized and enforced in this country in regard to the personal property of the deceased, the defendants' claim under it will be equally good, whether there is a will or not. It does not devolve upon this court to adjudicate upon the property of the deceased, but only to ascertain whether he has made a good will; and, if not, to grant administration of his effects. The defendants would, in any event, therefore, have to establish their claim under the decree in the proper courts of this country before they can obtain the right to appropriate the property of which the deceased died possessed in England.

If it should there be held that this decree in Paraguay, penal in its character, and made after the death of the person to be affected by it, is one which the English courts will not enforce upon his personal property in this country, this court will have done well in not permitting those who have no interest in the estate to provoke a litigation upon the validity of any will the deceased may have made. If a contrary conclusion should be arrived at, and the personal property of which the deceased died possessed shall be determined to have passed to the de-

fendants by virtue of the decree upon which this decision arises, no will, however made, can operate upon it, and the proceedings in this court can neither prevent nor retard the defendants in the acquisition of their rights.

*The court accordingly pronounced for the demurrer, with costs.*¹

ZAMMARETTI v. ZAMMARETTI.

COURT OF CASSATION, FRANCE. 1894.

[Reported 21 *Clunet*, 562.]

THE COURT. The judgment appealed from finds that by a deed executed on October 6, 1870, before Maître de Madre, Notary, at Paris, Xavier Zammaretti, an Italian subject, gave to his wife, in case she should survive him, all his property both movable and immovable; that Xavier Zammaretti died at Paris, in 1890, and that his widow claimed to inherit, by virtue of the Italian law, a third of his estate, and at the same time claimed the benefit of the gift notwithstanding a provision of the Italian law which forbids gifts between spouses during marriage.

The judgment appealed from held that the gift should be sustained so far as concerns immovable property in France, part of the estate; but declared the same gift null and of no effect so far as the movable property was concerned. The estate consisted of both movable and immovable property. This decision was based on the principle that movable property, both corporeal and incorporeal, follows the law of the legal domicile of the decedent.

Though Xavier Zammaretti lived for a long time in France, where he married and died, he never obtained authority from the government to establish his domicile in France; he failed, therefore, to acquire a domicile there, and the intestate or testamentary succession to his movable estate is therefore not governed by the French law. It remained under the control of the Italian law, which provides (Article 8 of the Preliminary Provisions of the Civil Code) that inheritance and testamentary succession, as to the order of succession and as to the distribution and the intrinsic validity of the provisions, are governed by the national law of the decedent, whatever be the nature of the property and wherever it may be.

The judgment appealed from, therefore, finding that Xavier Zammaretti, an Italian subject, had no legal domicile in France, has rightly refused to apply the provisions of the French law to his movable estate, and has properly applied the Italian law; and has consequently declared

¹ *Acc. In re Aganoor's Trusts*, 64 L. J. Ch. 521 — Ed.

the gift from the husband during marriage of his personal property void. This decision has not violated the articles of the Code cited in the appeal.

*Appeal dismissed.*¹

G. v. S.

REICHSGERICHT. 1883.

[*Reported 8 Entscheidungen des Reichsgerichts, Civilsachen, 145.*]

THE plaintiff, a resident of Stockholm, granddaughter and only descendant of the spouses S. of Stockholm who died at Frankfort-on-the-Main, claimed her legal right of succession on the ground of the law of Frankfort-on-the-Main. In answer to the declaration it was pleaded, among other things, that the question should be decided not by the law of Frankfort-on-the-Main but by the provisions of the Swedish law, which differed in some respects as to forced succession; since the spouses S. had not surrendered their Swedish nationality, and though resident in Frankfort had no legal domicil there. That the plaintiff's mother, as her guardian, had renounced the succession to her grandparents at Stockholm by a deed in legal form. The plaintiff replied that renunciation of a right of succession, even if permissible by the Swedish law, was not legal according to the law of Frankfort. Both the defendant's pleas were overruled in the lower courts, and the defendant alleged error.

THE COURT. The right of forced succession, being a law of succession which takes away the free power of disposition of the deceased, is, like laws of succession generally, to be decided not by the law which governs the heirs themselves but rather according to that which governed the deceased. Now the right of forced succession operates to restrain the power of disposition of the deceased; accordingly that law prevails which governs his civil capacity and his right to dispose of his property, to wit, the so-called statute personal. This law, however, in

¹ Acc. 23 Clunet, 662 (Brazil, 16 Mar. '95).

By the Italian law, succession to both personal and real estate is governed by the nationality of the decedent. 22 Clunet, 175 (Ital. Cons. Ct. 31 May, '94). In France this is true of movables. Where the decedent was born and domiciled in France, however, it was held that his movable succession was governed by the French law rather than by that of his nation. 22 Clunet, 628 (Seine, 9 Mar. '95). And where the law of the decedents' own country regulates the succession by the law of the situs, that law will be applied to movables in France. 6 Clunet, 285 (Cass. 24 June, '78). In a case where all the heirs were French, their interests were held to be governed by the French law instead of by that of the decedent. 20 Clunet, 595 (Nice, 6 Mar. '93).

In France succession to immovables is governed by the *lex rei sitæ*. 17 Clunet, 121 (Paris, 31 Dec. '89).

In Germany succession to both movables and immovables was (before the adoption of the Civil Code) regulated by the law of the domicil of the decedent. 13 Clunet, 732 (Darmstadt, 19 Nov. '83). — ED.

the view of the German common law, is not the law of the nation to which the person belongs through his duty of allegiance, but the law of the State to which the person belongs because he has his domicile within its jurisdiction. This is sometimes disputed in theory; but the doctrine, fully supported as it is by the principles of the common law, is not brought in question by the plaintiff in error.

It cannot be alleged as error that in settling the question whether Frankfort was the domicile of the deceased it was not considered whether he was legally permitted to establish a home or only lived there with a residence-card. Domicil as a pure question of fact is quite independent of right to establish a home. Its requisites, an intention to choose a place for a permanent residence and make it the centre of all the relations of one's life, and the execution of this intention by means of appropriate acts, may obviously exist without the legal right of residence. One may have the intention of making his home at a place where he has not the legal right to dwell, so long as he expects that, notwithstanding, there will be no obstacle in the way of his living there. None the less is the execution of this intention possible, so long as no use is made of the legal right of interfering with his further stay in the place. The mere possibility that this may happen puts an end to the existence of a domicile as little as the possibility that one may by his own free will move to another place.

The decision of the question of legal succession according to the law of Frankfort furnishes no cause of complaint to the plaintiff in error.

The objection which the defendant made because of the written renunciation of succession made by the plaintiff's mother, as her guardian, at Stockholm, on December 27, 1859, was rejected by the Court of Appeal; which judged the renunciation according to the law of Frankfort and denied it validity on the ground of the Frankfort Reformation, III. 2, §§ 4, 5; V. 4, § 2.

This decision is to be so far affirmed, as with reference to the question whether a renunciation of succession by an heir in the lifetime of the ancestor is valid and effectual that law is declared to govern which is generally in force for successions; in this case that which prevails at Frankfort, the domicile of the deceased. It is a question in case of the renunciation before the death of the decedent of the succession to him, either of the release of a right already the vested property of the releasor, in which case such a right in the lifetime of the decedent is not consistent with the statutory succession or forced succession; or about the refusal of a future succession, in which case the vesting of the right first takes place at the death of the decedent, and the refusal is null before vesting. The effect of renunciation consists rather in this: that, like a disinheritance, it prevents the vesting of the inheritance in the renouncer, so far as he has renounced.

See Hasse, *Rheinische Museum*, Vol. II. p. 151; Beseler, *Erbverträge*, Part II. Vol. 2, p. 236 ff; *System of German Private Law*, 3d ed. § 140, No. 3, 10; Hofmann in *Grünhut's Zeitschrift*, Vol. 3, p. 650,

657, 660 ff; judgment of the Court of Appeal, Rostock, in its *Entsch.* Vol. 5, p. 371; Seuffert, *Archiv*, vol. 20, No. 150.

The effect of the renunciation, therefore, would touch the property of the renouncer only in so far as it prevented an accession to it; it would touch the inheritance, on the other hand, when it fell to the one to whom it would have fallen if the renouncer had not been at hand. For these reasons, and in accordance with other questions of succession, the legality and effect of a renunciation of the succession during the lifetime of the deceased is to be decided not according to the law which governs the renouncer but according to the law which generally regulates succession, that is, that which governs the personal rights of the deceased. This is still clearer when it is a question about renunciation of a forced succession, by which the decedent would be freed from the restrictions put upon him by the provisions of the existing law of forced succession. The Court of Appeal, therefore, rightly applied not the Swedish law, which unquestionably recognizes the legality of the renunciation, but that of Frankfort.

The application of the law of Frankfort to the alleged renunciation of succession cannot be denied on the ground that it is not certain that at the time of the renunciation, December 27, 1859, the deceased by a change of his domicil to Frankfort had submitted himself to the law of that place. Whether a renunciation of succession in the lifetime of the deceased has legal effect upon the rights of succession which vest at his death is not to be determined according to the law which governs him at the time of the renunciation but by that which prevails at the opening of the succession. The same reasons which are stated above for applying the law ordinarily governing succession to the question of the legality and effect of a renunciation of succession are conclusive when time is considered as well as when place is in question.¹ . . .

SECTION II.

TESTAMENTARY SUCCESSION.

MOULTRIE v. HUNT.

COURT OF APPEALS, NEW YORK. 1861.

[*Reported 23 New York, 394.*]

DENIO, J.² One of the requisites to a valid will of real or personal property, according to the Revised Statutes, is, that the testator should,

¹ See 20 *Clunet*, 197 (Hamburg, 11 Nov. '89). — Ed.

² Part of this opinion, and the dissenting opinion, are omitted. — Ed.

at the time of subscribing it, or at the time of acknowledging it, declare, in the presence of at least two attesting witnesses, that it is his last will and testament. 2 R. S. p. 63, § 40. The will which the Surrogate of New York admitted to probate, by the order under review, was defectively executed in this particular—the only statement which the alleged testator made to the witnesses being that it was his signature and seal which was affixed to it. It was correctly assumed by the Surrogate in his opinion, and by the Supreme Court in pronouncing its judgment of affirmance, that the instrument could not be sustained as a will under the provisions of the Revised Statutes, but that, if it could be upheld at all, it must be as a will executed in another State, according to the law prevailing there; and, upon that view, it was established by both these tribunals as a valid testament. In point of fact the instrument was drawn, signed, and attested at Charleston, in South Carolina, where such a declaration of the testator to the witnesses, as has been mentioned, is not required to constitute a valid execution of a will. Mr. Hunt, the alleged testator, resided at that time in Charleston; but, some time before his death, he removed to the city of New York, and he continued to reside in that city from that time until his death. The will was validly executed, according to the laws of South Carolina.

Although the language of our statute, to which reference has been made, includes, in its generality, all testamentary dispositions, it is, nevertheless, true, that wills, duly executed and taking effect in other States and countries according to the laws in force there, are recognized in our courts as valid acts, so far as concerns the disposition of personal property. *Parsons v. Lyman*, 20 N. Y. 103. This is according to the law of international comity. Every country enacts such laws as it sees fit as to the disposition of personal property by its own citizens, either *inter vivos* or testamentary; but these laws are of no inherent obligation in any other country. Still, all civilized nations agree, as a general rule, to recognize titles to movable property created in other States or countries in pursuance of the laws existing there, and by parties domiciled in such States or countries. This law of comity is parcel of the municipal law of the respective countries in which it is recognized, the evidence of which, in the absence of domestic legislation or judicial decisions, is frequently sought in the treatises of writers on international law, and in certain commentaries upon the civil law which treat more or less copiously upon subjects of this nature.

If the alleged testator in the present case had continued to be an inhabitant of South Carolina until his death, we should, according to this principle, have regarded the will as a valid instrument, and it would have been the duty of our probate courts to have granted letters testamentary to the executors named in it. The statute contemplates such a case when it provides for the proving of such wills upon a commission to be issued by the Chancellor, and for granting letters upon a will admitted to probate in another State. 2 R. S. p. 67, §§ 68, 69. These provisions do not profess to define under what circumstances a will

made in a foreign jurisdiction, not in conformity with our laws, shall be valid. It only assumes that such wills may exist, and provides for their proof.

The question in the present case is, whether, inasmuch as the testator changed his domicile after the instrument was signed and attested, and was, at the time of his death, a resident citizen of this State, he can, within the sense of the law of comity, be said to have made his will in South Carolina. The paper which was signed at Charleston had no effect upon the testator's property while he remained in that State, or during his lifetime. It is of the essence of a will that, until the testator's death, it is ambulatory and revocable. No rights of property, or powers over property, were conferred upon any one by the execution of this instrument; nor were the estate, interest, or rights of the testator in his property in any way abridged or qualified by that act. The transaction was, in its nature, inchoate and provisional. It prescribed the rules by which his succession should be governed, provided he did not change his determination in his lifetime. I think sufficient consideration was not given to this peculiarity of testamentary dispositions, in the view which the learned Surrogate took of the case. According to his opinion, a will, when signed and attested in conformity with the law of the testator's domicil, is a "consummate and perfect transaction." In one sense it is, no doubt a finished affair; but I think it is no more consummate than a bond would be which the obligor had prepared for use by signing and sealing, but had kept in his own possession for future use. The cases, I concede, are not entirely parallel; for a will, if not revoked, takes effect by the death of the testator, which must inevitably happen at some time, without the performance of any other act on his part, or the will of any other party; while the uttering of a written obligation, intended to operate *inter vivos*, requires a further volition of the party to be bound, and the intervention of another party to accept a delivery, to give it vitality. But, until one or the other of these circumstances — namely, the death, in the case of a will, or the delivery, where the instrument is an obligation — occurs, the instrument is of no legal significance. In the case of a will it requires the death of the party, and in that of a bond a delivery of the instrument, to indue it with any legal operation or effect. The existence of a will, duly executed and attested, at one period during a testator's lifetime, is a circumstance of no legal importance. He must die leaving such a will, or the case is one of intestacy. *Betts v. Jackson*, 6 Wend. 173–181. The provisions of a will made before the enactment of the Revised Statutes, and in entire conformity with the law as it then existed, but which took effect by the death of the testator afterwards, were held to be annulled by certain enactments of these statutes respecting future estates, notwithstanding the saving contained in the repealing act, to the effect that the repeal of any statutory provision shall not affect any act done, &c., previous to the time of the repeal. *De Peyster v. Clendining*, 8 Paige, 295; 2 R. S. p. 779, § 5;

Bishop v. Bishop, 4 Hill, 138. The Chancellor declared that the trusts and provisions of the will must depend upon the law as it was when it took effect by the death of the testator; and the Supreme Court affirmed that doctrine. There is no distinction, in principle, between general acts bearing upon testamentary provisions, like the statute of uses and trusts, and particular directions regarding the formalities to be observed in authenticating the instrument; and I do not doubt that all the wills executed under the former law, and which failed to conform to the new one, where the testator survived the enactment of the Revised Statutes, would have been avoided, but for the saving in the 70th section, by which the new statute was not to impair the validity of the execution of a will made before it took effect. 2 R. S. p. 68. If, as has been suggested, a will was a consummated and perfect transaction before the death of a testator, no change in the law subsequently made would affect it — the rule being, that what has been validly done and perfected respecting private rights under an existing statute is not affected by a repeal of the law. *Reg. v. The Inhabitants of Denton*, 14 Eng. L. & Eq. 124, per Lord Campbell, C. J.

If then a will legally executed under a law of this State, would be avoided by a subsequent change made in the law, before the testator's death, which should require different or additional formalities, it would seem that we could not give effect to one duly made in a foreign State or country, but which failed to conform to the laws of this State, where, at the time of its taking effect by the testator's death, he was no longer subject to the foreign law, but was fully under the influence of our own legal institutions. The question in each case is, whether there has been an act done and perfected under the law governing the transaction. If there has been, a subsequent change of residence would not impair the validity of the act. We should be bound to recognize it by the law of comity, just as we would recognize and give validity to a bond reserving eight per cent interest, executed in a State where that rate is allowed, or a transfer of property which was required to be under seal, but which had in fact been executed by adding a scroll to the signer's name in a State where that stood for a seal or the like. An act done in another State, in order to create rights which our courts ought to enforce on the ground of comity, must be of such a character that if done in this State, in conformity with our laws, it could not be constitutionally impaired by subsequent legislation. An executed transfer of property, real or personal, is a contract within the protection of the Constitution of the United States, and it creates rights of property which our own Constitution guarantees against legislative confiscation. Yet I presume no one would suppose that a law prescribing new qualifications to the right of devising or bequeathing real or personal property, or new regulations as to the manner of doing it, and making the law applicable in terms to all cases where wills had not already taken effect by the death of the testator, would be constitutionally objectionable.

I am of opinion that a will has never been considered, and that it is not by the law of this State, or the law of England, a perfected transaction, so as to create rights which the courts can recognize or enforce, until it has become operative by the death of the testator. As to all such acts which remain thus inchoate, they are in the nature of unexecuted intentions. The author of them may change his mind, or the State may determine that it is inexpedient to allow them to take effect, and require them to be done in another manner. If the law-making power may do this by an act operating upon wills already executed, in this State, it would seem reasonable that a general act, like the statute of wills, contained in the Revised Statutes, would apply itself to all wills thereafter to take effect by the death of the testator in this State, wherever they might be made; and that the law of comity, which has been spoken of, would not operate to give validity to a will executed in another State, but which had no legal effect there until after the testator, by coming to reside here, had fully subjected himself to our laws; nor then, until his testamentary act had taken effect by his death.

It may be that this conclusion would not, in all cases, conform to the expectations of testators. It is quite possible that a person coming here from another State, who had executed his will before his removal, according to the law of his former residence, might rely upon the validity of that act; and would die intestate, contrary to his intention, in consequence of our laws exacting additional formalities with which he was unacquainted. But it may be also that a well-informed man, coming here under the same circumstances, would omit to republish, according to our laws, his will, made at his former domicil, because he had concluded not to give legal effect, in this jurisdiction, to the views as to the disposition of his property which he entertained when it was executed. The only practical rule is, that every one must be supposed to know the law under which he lives, and conform his acts to it. This is the rule of law upon all other subjects, and I do not see any reason why it should not be in respect to the execution of wills.

In looking for precedents and juridical opinions upon such a question, we ought, before searching elsewhere, to resort to those of the country from which we derive our legal system, and to those furnished by the courts and jurists of our own country. It is only after we have exhausted these sources of instruction, without success, that we can profitably seek for light in the works of the jurists of the continent of Europe.

The principle adopted by the Surrogate is that, as to the formal requirements in the execution of a will, the law of the country where it was in fact signed and attested is to govern, provided the testator was then domiciled in such country, though he may have afterwards changed his domicil, and have been at his death a domiciled resident of a country whose laws required different formalities. Upon an attentive examination of the cases which have been adjudged in the English and American courts, I do not find anything to countenance this doctrine; but much

authority, of quite a different tendency. The result of the cases, I think, is, that the jurisdiction in which the instrument was signed and attested, is of no consequence, but that its validity must be determined according to the domicile of the testator at the time of his death. Thus, in *Grattan v. Appleton*, 3 Story's R. 755, the alleged testamentary papers were signed in Boston, where the assets were, and the testator died there, but he was domiciled in the British province of New Brunswick. The provincial statute required two attesting witnesses, but the alleged will was unattested. The court declared the papers invalid, Judge Story stating the rule to be firmly established, that the law of the testator's domicile was to govern in relation to his personal property, though the will might have been executed in another State or country where a different rule prevailed. The judge referred, approvingly, to *Desesbats v. Berquier*, 1 Bin. 336, decided as long ago as 1808. That was the case of a will executed in St. Domingo by a person domiciled there, and sought to be enforced in Pennsylvania, where the effects of the deceased were. It appeared not to have been executed according to the laws of St. Domingo, though it was conceded that it would have been a good will if executed by a citizen of Pennsylvania. The alleged will was held to be invalid. In the opinion delivered by Chief Justice Tilghman, the cases in the English ecclesiastical courts, and the authorities of the writers on the law of nations, were carefully examined. It was declared to be settled, that the succession to the personal estate of an intestate was to be regulated according to the law of the country in which he was a domiciliated inhabitant at the time of his death, and that the same rule prevailed with respect to last wills. I have referred to these cases from respectable courts in the United States, because their judgments are more familiar to the bar than the reports of the spiritual courts in England. But these decisions are fully sustained by a series of well-considered judgments of these courts. *De Bonneval v. De Bonneval*, 1 Curt. 856; *Curling v. Thornton*, 2 Addams, 6; *Stanley v. Bernes*, 3 Hag. 373; *Countess Ferraris v. Hertford*, 3 Curt. 468. It was for a time attempted to qualify the doctrine, in cases where the testator was a British subject who had taken up his residence and actual domicile in a foreign country, by the principle that it was legally impossible for one to abjure the country of his birth, and that therefore such a person could not change his domicile; but the judgment of the High Court of Delegates, in *Stanley v. Bernes*, finally put the question at rest. In that case an Englishman, domiciled in Portugal and resident in the Portuguese Island of Maderia, made a will and four codicils, all of which were executed according to the Portuguese law, except the two last codicils, and they were all executed so as to be valid wills by the law of England, if it governed the case. Letters were granted upon the will and two first codicils, but the other codicils were finally pronounced against. The Reporter's note expresses the result in these words: "If a testator (though a British subject) be domiciled abroad, he must conform, in his testamentary acts, to the

formalities required by the *lex domicilii*." See, also, *Somerville v. Somerville*, 5 Ves. 750; and *Price v. Dewhurst*, 8 Simons, 279, in the English Court of Chancery.

It is true that none of these decisions present the case of a change of domicile, after the signing and attesting of a will. They are, notwithstanding, fully in point, if I have taken a correct view of the nature and effect of a will during the lifetime of the testator. But the remarks of judges in deciding the cases, and the understanding of the Reporters clearly show, that it is the domicile of the testator at the time of his death which is to be considered in seeking for the law which is to determine the validity of the will. Thus, in *De Bonneval v. De Bonneval*, the question was upon the validity of the will executed in England, of a French nobleman who emigrated in 1792, and died in England in 1836. Sir Herbert Jenner states it to have been settled by the case of *Stanley v. Bernes*, that the law of the place of the domicile, and not the *lex loci rei sitæ*, governed "the distribution of, and succession, to personal property in testacy or intestacy." The Reporters' note is, that the validity of a will "is to be determined by the law of the country where the deceased was domiciled at his death."

Nothing is more clear than that it is the law of the country where the deceased was domiciled at the time of his death, which is to regulate the succession of his personalty in the case of intestacy. Judge Story says, that the universal doctrine now recognized by the common law, is, that the succession to personal property, *ab intestato*, is governed exclusively by the law of the actual domicile of the intestate at the time of his death. Conf. Laws, § 481. It would be plainly absurd to fix upon any prior domicile in another country. The one which attaches to him at the instant when the devolution of property takes place, is manifestly the only one which can have anything to do with the question. Sir Richard Pepper Arden, Master of the Rolls, declared, in *Somerville v. Somerville*, that the rule was that the succession to the personal estate of an intestate was to be regulated by the law of the country in which he was domiciled at the time of his death, without any regard whatever to the place of nativity, or the place where his actual death happened, or the local situation of his effects.

Now, if the legal rules which prevail in the country where the deceased was domiciled at his death are those which are to be resorted to in case of an intestacy, it would seem reasonable that the laws of the same country ought to determine whether in a given case there is an intestacy or not, and such we have seen was the view of Chief Justice Tilghman. Sir Lancelot Shadwell, Vice-Chancellor, in *Price v. Dewhurst*, also expressed the same view. He said, "I apprehend that it is now clearly established by a great variety of cases, which it is not necessary to go through in detail, that the rule of law is this: that when a person dies intestate, his personal estate is to be administered according to the law of the country in which he was domiciled at the time of his death, whether he was a British subject or not; and the

question whether he died intestate or not must be determined by the law of the same country." The method of arriving at a determination in the present case, according to this rule, is, to compare the evidence of the execution of his will with the requirements of the Revised Statutes. Such a comparison would show that the deceased did not leave a valid will, and consequently that he died intestate.

Being perfectly convinced that according to the principles of the common law, touching the nature of last wills, and according to the result of the cases in England and in this country which have been referred to, the will under consideration cannot be sustained, I have not thought it profitable to spend time in collecting the sense of the foreign jurists, many of whose opinions have been referred to and copiously extracted in the able opinion of the learned Surrogate, if I had convenient access to the necessary books, which is not the case. I understand it to be conceded that there is a diversity of opinion upon the point under consideration among these writers; but it is said that the authors who assert the doctrine on which I have been insisting, are not those of the highest character, and that their opinions have been criticised with success by M. Felix, himself a systematic writer of reputation on the conflict of laws. Judge Story, however, who has wrought in this mine of learning with a degree of intelligence and industry which has excited the admiration of English and American judges, has come to a different conclusion. His language is: "But it may be asked, what will be the effect of a change of domicil after a will or testament is made, of personal or movable property, if it is valid by the law of the place where the party was domiciled when it was made, and not valid by the law of his domicil at the time of his death? The terms in which the general rule is laid down would seem sufficiently to establish the principle that in such a case the will and testament is void; for it is the law of his actual domicil at the time of his death, and not the law of his domicil at the time of his making his will and testament of personal property, which is to govern." Section 473. He then quotes at length the language of John Voet to the same general effect. It must, however, be admitted that the examples put by that author, and quoted by Judge Story, relate to testamentary capacity as determined by age, and to the legal ability of the legatees to take, and not to the form of executing the instrument. And the Surrogate has shown, by an extract from the same author, that a will executed in one country according to the solemnities there required, is not to be broken solely by a change of domicil to a place whose laws demand other solemnities. Of the other jurists quoted by the Surrogate, several of them lay down rules diametrically opposite to those which confessedly prevail in this country and in England. Thus, Toller, a writer on the civil law of France, declares that the form of testaments does not depend upon the law of the domicil of the testator, but upon the place where the instrument is in fact executed; and Felix, Malin, and Pothier are quoted as laying down the same principle. But nothing is more clear, upon the English and

American cases, than that the place of executing the will, if it is different from the testator's domicile, has nothing to do with determining the proper form of executing and attesting. In the case referred to from Story's Reports, the will was executed in Boston, but was held to be invalid because it was not attested as required by a provincial statute of New Brunswick, which was the place of the testator's domicile. If the present appeal was to be determined according to the civil law, I should desire to examine the authorities more fully than I have been able to do; but considering it to depend upon the law as administered in the English and American courts, and that according to the judgment of these tribunals it is the law of the domicile of the testator at the time of his death that is to govern, and not that of the place where the paper happened to be signed and attested, where that is different from his domicile at the time of his decease, I cannot doubt that the Surrogate and Supreme Court fell into an error in establishing the will. . . .

The will under immediate consideration was not, we think, legally executed; and the determination of the Surrogate and of the Supreme Court, which gave it effect, must be reversed.

COMSTOCK, C. J., LOTT, JAMES, and HOYT, JJ., concurred.

DAVIES, SELDEN, and MASON, JJ., dissented.

*Judgment reversed.*¹

ROBERTSON v. PICKRELL.

SUPREME COURT OF THE UNITED STATES. 1883.

[Reported 109 *United States*, 608.]

FIELD, J.² This was an action of ejectment for a parcel of land in the city of Washington, District of Columbia. On the trial the plaintiffs gave in evidence a conveyance of the premises from the United States to one Robert Moore, executed in June, 1800; and then endeavored to trace title from the grantee through a devise in his last will and testament, bearing date in July, 1803. For this purpose they produced and offered a transcript of proceedings in the Hustings Court of Petersburg, in the State of Virginia, containing a copy of the will and of its probate in that court in December, 1804.

By the law of Virginia then in force, that court was authorized to take the probate of wills, as well of real as of personal estate; and

¹ *Acc. Nat v. Coons*, 10 Mo. 543 (*semble*). The general principle that the validity of a will of personalty depends upon the law of the domicile is well established. *Enohin v. Wylie*, 10 H. L. C. 1; *Macdonald v. Macdonald*, L. R. 14 Eq. 60; *Desesbats v. Berquier*, 1 Binn. 336. The validity of a bequest is judged by the same law. *Jones v. Habersham*, 107 U. S. 174; *Fellows v. Miner*, 119 Mass. 541; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Dammert v. Osburn*, 141 N. Y. 564, 35 N. E. 1088. — Ed.

² Part of the opinion is omitted. — Ed.

when a will was exhibited to be proved, it could proceed immediately to receive proofs, and to grant a certificate of its probate. Within seven years afterwards its validity was open to contestation in chancery by any person interested ; but, if not contested within that period, the probate was to be deemed conclusive, except as to parties laboring at the time under certain disabilities, who were to have a like period to contest its validity after the removal of their disabilities.

The transcript was offered not merely as an exemplified copy of the record of the last will and testament of Robert Moore, and of its probate in the Hustings Court, but also as conclusive proof of the validity of the will, and of all matters involved in its probate. Upon objection of the defendants' counsel, it was excluded, and an exception was taken to the exclusion. The ruling of the court constitutes the principal error assigned for a reversal of the judgment.

We think the ruling was correct. Looking at the transcript presented, we find that it shows only that a paper purporting to be the last will and testament of the deceased was admitted to record upon proof that the instrument and the signature to it were in his handwriting. No witnesses to its execution were called, no proof was offered of the genuineness of the signatures of the parties whose names are attached to it as witnesses, and no notice was given to parties interested of the proceedings in the Hustings Court. As a record it furnishes no proof of an instrument executed as a last will and testament in a form to pass real estate in the District of Columbia. The execution of such a will must be attested by at least three witnesses. It matters not how effective the instrument may be to pass real property in Virginia ; it must be executed in the manner prescribed by the law in force in the district to pass real property situated there, and its validity must be established in the manner required by that law. It is familiar doctrine that the law of the place governs as to the formalities necessary to the transfer of real property, whether testamentary or *inter vivos*. In most of the States in the Union a will of real property must be admitted to probate in some one of their courts before it can be received elsewhere as a conveyance of such property. But by the law of Maryland, which governs in the District of Columbia, wills, so far as real property is concerned, are not admitted to such probate. The common-law rule prevails on that subject. The Orphans' court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also ; but the probate is evidence of the validity of the will only so far as the personal property is concerned. As an instrument conveying real property the probate is not evidence of its execution. That must be shown by a production of the instrument itself and proof by the subscribing witnesses ; or, if they be not living, by proof of their handwriting.

So it matters not that the same effect is to be given in the courts of this district to the record of the Hustings Court, which, by the law of Virginia, can be given to it there ; that is, that it is to be received as

sufficient to pass the title to real property situated in that State. The question still remains — is the instrument sufficient to pass title to real property in the District of Columbia? If so, it should have been produced and proved in the manner mentioned. If, as stated by counsel, it is on file in the Hustings Court, and by the law of Virginia cannot be removed, then it should have been proved under a commission, as other instruments out of the State are proved, when it is impossible to compel their production in court.

The act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle, and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Works v. Columbia College*, 17 Wall. 521, 529.

It does not appear that the validity of the will of Moore, as probated in 1804 in the Hustings Court of Petersburg, was ever afterwards contested in a Court of Chancery in Virginia. Its probate must, therefore, be deemed conclusive, so far as that State is concerned, and the will held sufficient to pass all property which can be there transferred by a valid instrument of that kind. But no greater effect can be given out of Virginia to the proceeding in the Hustings Court. The probate establishes nothing beyond the validity of the will there. It does not take the place of provisions necessary to its validity as a will of real property in other States, if they are wanting. Its validity as such will, in other States, depends on its execution in conformity with their laws; and if probate there be also required, such probate must be had before it can be received as evidence.

Authority for these views is found in the cases of *McCormack v. Sullivant*, 10 Wheat. 192, and of *Darby v. Mayer*, 10 Wheat. 465. In the first of them it appeared that by the law of Ohio, before a will devising real property can be considered as valid, it must be presented to the court of common pleas of the county where the land lies, for probate, and be proved by at least two of the subscribing witnesses, unless it has been proved and recorded in another State according to its laws; in which case an authenticated copy can be offered for probate without proof by the witnesses. A will devising real property in that State was admitted to probate in the State of Pennsylvania, and this court held that such probate gave no validity to the will in respect to the real property in Ohio, as to which the deceased was to be considered as having died intestate. *McCormack v. Sullivant*, 10 Wheat. at 202, 203. In the second case, which was an action of ejectment for land in Tennessee, the defendant endeavored to trace title to the premises through the will of one Kitts. For that purpose a copy and pro-

bate of the will devising the property were produced in evidence, certified from the Orphans' Court of Baltimore County, Maryland, and admitted against the objection of the plaintiff. This court held the record inadmissible, and in its opinion explained the common-law doctrine as to what was legal evidence in an action of ejectment to establish a devise of real property. It stated that the ordinary's probate was no evidence of the execution of the will in ejectment; that where the will itself was in existence and could be produced, it was necessary to produce it; and that when the will was lost or could not be produced, secondary evidence was necessarily resorted to; but that, whatever the proof, it was required to be made before the court which tried the cause, the proof before the ordinary being *ex parte*, the heir at law having no opportunity to cross-examine the witnesses, and the same solemnities not being required to admit the will to probate, which are indispensable to give it validity as a devise of real property. And the court added that the law of Maryland, with regard to the evidence of a devise in ejectment, was the common law of England, and had been so recognized in decisions of the courts of that State. *Darby v. Mayer*, 10 Wheat. at 468, 469.

The first of these cases shows that the probate of a will of real property in one State is of no force in establishing the validity of the will in another State. That must be determined by the laws of the State where the property is situated. The second case shows that the proof of a devise of land in ejectment in Maryland — and its law obtains in this district — must be made by the production of the will in court, and evidence of its execution by the subscribing witnesses; or, if the will be lost, or cannot be produced, the proof must be made by secondary evidence of its execution and contents.

The plaintiffs contend that they can use the record of the Hustings Court in Virginia as proof of the genuineness of the instrument, and then supplement that proof by parol evidence that the original was executed by three witnesses, and thus establish it as a will sufficient to pass real estate in the District of Columbia. But in this contention they overlook a material circumstance. It is not sufficient to give effect to an instrument as a will of real property that its genuineness merely be established. Its genuineness must be shown by the witnesses, if they are living, who attested its execution and heard the declaration of the testator as to its character, and, if dead, their handwriting must be proved, as already stated. No other proof will answer; certainly not the probate of the will on *ex parte* testimony by a tribunal of another State or country.¹

¹ The rule here laid down is of general application. The law of the situs of the land governs the methods of executing, proving, and recording a will, so far as it devises land. *Callaway v. Doe*, 1 Blackf. 372; *Keith v. Keith*, 97 Mo. 223, 10 S. W. 597; *Lapham v. Olney*, 5 R. I. 413. The same law governs the validity of the devise, *Hobson v. Hale*, 95 N. Y. 588; *Lewis v. Doerle*, 28 Ont. 412; the nature of the title conveyed: *Pratt v. Douglas*, 38 N. J. Eq. 516; the right of devising as against heirs:

CARPENTER v. BELL.

SUPREME COURT OF TENNESSEE. 1896.

[Reported 96 Tennessee, 294.]

BEARD, J. The will which is the subject of this litigation was executed by a *feme covert*, who was, at the date of its execution as well as at the time of her death, a resident of the State of Kentucky, and by it the testatrix undertakes to dispose of real property in this State. Notwithstanding all the formalities required by our statutes to validate such a will have been observed in this case, yet it is insisted that, as the law of Kentucky incapacitates a married woman from making a disposition of such property by last will and testament, this incapacity follows the instrument into this State and defeats the devise of realty located here. The bill in this cause is filed on this theory.

This contention is unsound, as is well settled by the authorities. As to immovable property, the rule is that the *lex rei sitæ* governs as to the capacity or incapacity of the testator, the extent of his power of disposition, and the forms and solemnities necessary to give the will its due authority and effect. Pritchard on Wills, § 53; Williams v. Saunders, 5 Cold. 60; Rorer on Int. Law, 288, note; Story on Con. of Laws, § 474; White v. Howard, 46 N. Y. 144; Ford v. Ford, 70 Wis. 19.

The result is, that the decree of the Chancellor dismissing complainant's bill will be affirmed with costs.¹

MAYOR, ALDERMEN, AND CITIZENS OF CANTERBURY
v. WYBURN.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1894.

[Reported [1895] Appeal Cases, 89.]

LORD HOBHOUSE.² On the 13th of June, 1891, J. G. Beaney, an inhabitant of Melbourne, and a domiciled Victorian, died, having by a codicil to his will bequeathed legacies to the appellants in the following terms:—

“ I direct my said trustee to pay to the mayor and corporation of the said city of Canterbury for the time being the sum of ten thousand

Eyre v. Storer, 37 N. H. 114; the effect of the will upon after-acquired land: Frazier v. Boggs, 37 Fla. 307, 20 So. 245; Wynne v. Wynne, 23 Miss. 251.

In several States, by statute, a will good where made will pass land. Irwin's Appeal, 33 Conn. 128; Lyon v. Ogden, 85 Me. 374, 27 Atl. 258.

A chattel real is to be treated like land in this respect. Pepin v. Bruyère, [1900] 2 Ch. 504; De Fogassieras v. Duport, 11 L. R. Ir. 123.—ED.

¹ Acc. Holman v. Hopkins, 27 Tex. 38.—ED.

² The opinion only is given.—ED.

pounds, for the purpose of their buying a suitable piece of ground at Canterbury aforesaid and erecting thereon with as little delay as possible a free library and reading-room for the working classes; such building when erected to be called 'The Beane Institute for the Education of Working Men.' And I also bequeath to the said mayor and corporation of the said city of Canterbury all my medical diplomas and military commissions for the purpose of their being hung up and exhibited in the principal hall of the said building so to be erected as aforesaid."

By another codicil he bequeathed some more articles of a like kind in a like way. His residuary legatees are certain charitable institutions in Melbourne, of whom the respondents, the Melbourne Hospital, have been selected to defend the interests of all. They contend here that the gift of £10,000 to the appellants must fail by reason of the English statute law which restricts gifts to charitable uses.

The case was argued before A'Beckett, J., upon certain questions propounded for the court to answer; and by his answers that learned judge maintained the validity of the gifts, and directed the executors to comply with the directions of the testator. He finds that there is nothing in the law of Victoria to prevent such a testamentary gift. He adds:—

"If it had been shown that under the law as it stands in England the corporation of Canterbury could not lawfully spend £10,000 in buying land and erecting a building as contemplated by the testator, and therefore that the object of the testator could not lawfully be accomplished, I should not direct the executors to pay the legacy to the corporation. This has not been shown. It appears that the corporation could lawfully have expended £10,000 in this manner if the testator had sent the money to them in his lifetime, and that they will have the right to spend it in this manner if sent them by his executors as directed by his will."

The residuary legatees appealed, and the full court varied the decision of the first court by holding that the bequest of money was invalid, and, the residuary legatees consenting, that the bequests of chattels were valid. The reasons of the three learned judges are in substance identical. They consider that as the £10,000 is given for the purchase of land in England the case is the same as if the testator had actually devised land of his own in England, and they argue, justly enough, that nobody can so operate on English land.

From their order, holding the bequest of money invalid, the present appeal is brought; and their Lordships have to consider whether it is right. Of course, there is no doubt of the competency of the English legislature to forbid such gifts. The question is whether it has done so. It would seem that this is the first occasion on which such a question has come into court for decision.

It appears to their Lordships that the arguments relied on by the full court, and by the respondents' counsel at this bar, err in exaggerating

the amount of prohibition imposed by the English statutes, and in ascribing to it a more absolute effect than it really has. The Attorney-General indeed, in his argument for the residuary legatees, insisted on the title of the Act of 9 Geo. II. c. 36, passed in the year 1736: "An act to restrain the disposition of lands, whereby the same become unalienable." That title correctly expresses the object of the act; but it is manifest from the preamble and the operative parts of the act that it does not purport to restrain every such disposition, nor does the title say that it does. If there were an absolute prohibition of all gifts of land for charitable uses, Mr. Beaney's gift could not take effect. But as in fact the English statutes leave all persons as free as they were by common law to give or to receive any amount of land for those purposes, provided only that they observe the positive rules prescribed for them, the question in each case is whether the mode of acquiring land is a lawful or a forbidden one.

The statute which now governs this question was passed in the year 1888 (51 & 52 Vict. c. 42), and according to a recent practice, it has no preamble to give the key to its policy. But it is mainly an act of consolidation; if it effects any alteration in the previous law, the difference does not concern the question now to be decided; and it must be taken that its provisions rest upon precisely the same policy as those of the statute 9 Geo. II. c. 36.

The preamble of that statute refers to the older statutes passed to restrain the mischiefs of gifts in mortmain. Then it proceeds: "Nevertheless this publick mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherision of their lawful heirs; for remedy whereof be it enacted." This, then, was the mischief which the legislature desired to abate: the increase of land held in mortmain by gifts which may for brevity, and somewhat loosely, be termed death-bed gifts. The mode taken to restrain this mischief was to enact that no land, nor any money to be laid out in the purchase of land, should be given to any person for the benefit of any charitable use, unless the gift be made by deed executed twelve calendar months at least before the death of the donor, and enrolled in Chancery within six calendar months of its execution, and unless the gift be made to take immediate effect. Another section extends the prohibition to charges affecting land, which is a large class—at that date a much larger relative class than now—of personal estate; and it declares that the prohibited gifts shall be absolutely null and void. Therefore, in all cases of wills to which the statute applies, such gifts are prohibited by its express terms.

It is expressly enacted that the statute shall not extend to the grant of any estate in Scotland. After a time came the question whether it extends to the Colonies, and that question was settled in the negative in the case of *Attorney-General v. Stewart*, 2 Mer. 143, decided by Sir

William Grant in the year 1817. He considered that both the mischief struck at by the act, and the methods prescribed for lawful gifts, were of a local character peculiar to England. Therefore, he held that the act did not extend to Grenada, though it is in general terms, and though the laws of England had been extended in general terms to the island when first ceded in 1763, and again when recovered in 1784. That opinion has ever since prevailed, and in the case of the Gilchrist foundation, *Whicker v. Hume*, 7 H. L. Rep., 124, it was applied to a gift of land in New South Wales.

In that state of the law the present act of 1888 was passed. By sect. 4, sub-sect. 1, it is enacted thus:—

“Subject to the savings and exceptions contained in this act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this act, and unless so made shall be void.”

The requirements of the act are substantially those of the act of 1736. If the assurance is of personal estate not being stock in the public funds, it must be made by deed enrolled within six months of the execution, and, if it is not made for full valuable consideration, executed twelve months before the death of the assurors. By the interpretation clause the term “assurance” includes a will. This act therefore, subject to some special exemptions, prohibits “death-bed” gifts as strictly as does the earlier act. But it is impossible to suppose that the English legislature intended to affect a will subject to the law of Victoria. All the reasons against such a construction which were applied to the earlier enactment apply to the later one. It is expressly declared that the act does not extend to Scotland or Ireland. To declare that a bequest made by a colonial will shall be void on the ground that it contravenes the local law of England may not be beyond the competence of the Imperial Parliament, but is quite beyond its ordinary scope, and such an intention ought not to be imputed to it without very clear grounds. Seeing, indeed, that the repealed and consolidated statutes did not apply to the Colonies, and that Scotland and Ireland are expressly excepted from the new statute, it is impossible without express words to suppose that there was any intention of affecting the Colonies by the new statute. Moreover, Sir Wm. Grant’s other reasons apply exactly to the present question. It cannot have been intended that methods of a local character prescribed for making a lawful gift should be adopted in a distant colony, or, if not, that the gift should be invalid.

Indeed, the case for the residuary legatees is not rested on any such broad ground as this. The courts below are agreed that the Victorian testator is quite free to make such a gift as he has made; nor has the contrary been contended here. But for that conclusion the word “assurance” in the act must receive the qualification that it means something which is governed by English law.

Of course it is a different thing to say that English law must decide whether English land can be bought with money coming from such a source as a foreign will; and that, if it decides in the negative, the bequest must fail, not because it is illegal, but because it is impossible of execution. The Attorney-General stated broadly that the prohibitions of the Statutes of Mortmain are an integral part of the English law of real property. So they are; but the question is, how far they operate. The suggestion is that they operate to invalidate gifts of money coupled with an obligation to lay them out in land, if they have their origin in a will, though a perfectly valid will. Their Lordships cannot find such a prohibition in the act. They have reached the conclusion that this will is not invalidated by sub-sect. 1. At what point, then, of the transactions does the English law come in? Not between the Victorian testator and his Victorian executor. In their Lordships' view the English law will operate whenever a purchase of land for the charitable uses is effected, but no earlier. The assurance of that land must be made in accordance with the provisions of the act. Anybody may give money for such a purpose in the permitted mode. The testator might himself have bought land in Canterbury and have devoted it to charitable uses quite lawfully. What he might do himself he might do through trustees, by giving money to trustees for the purpose of acquiring land in a lawful way. Is there anything to prevent him from ordering his executors to do the same thing? The answer is that his will is not affected by English law. It is a valid will binding on his executors; and a Victorian court of justice should direct them to perform their obligation.

It has been contended very earnestly that the point is settled by the decision in *Attorney-General v. Mill*, 2 Dow & Cl. 393. In that case the testator was a native of Montrose. He spent many years in the island of Carriacou, where he owned land and amassed a large fortune. He returned to Montrose, and stayed there about five years. Then he came to England, and resided first in London and afterwards in Bath, up to his death in 1805, fourteen years afterwards. In 1791 he executed a will and a deed, by which he gave money to be invested in the purchase of land, ordering the income to be paid to certain Scottish trustees for the benefit of indigent ladies in Montrose. His will, with four codicils, all in English form, was proved in England. In his will and contemporaneous deed he described himself as of the island of Carriacou, now residing in Marylebone. His codicils, it was stated at the bar, contained similar descriptions. His foreign assets were transmitted to England, and were administered under the direction of the Court of Chancery and were the subject of a decree which paid no regard to the charitable gift. Subsequently an information was filed by the Attorney-General for the establishment of the charity by purchase of land in Scotland. It was held by Lord Lyndhurst, first in Chancery, and afterwards in the House of Lords, that the testator must be taken to have directed the purchase of land in England, and that his gift contravened the mortmain laws and was void.

It is now argued that the testator was a domiciled Scotsman, and that the case decides that a bequest of money in a Scottish will directing the purchase of land in England for a charity is a void bequest. But the assumption that the testator had a Scottish domicile is not warranted by anything to be found in the reports. In the meagre history of his life there is much to suggest arguments for an English domicile, and the counsel for the Attorney-General who was contending for the validity of the gift did not suggest any other domicile. The word "domicil" occurs only twice in the reports of the case. In one of them, 2 Dow & Cl. 394, the reporter uses a casual expression to the effect that on leaving Cariatou the testator resumed his domicile in Montrose; an expression which Lord St. Leonards, writing many years afterwards, repeated. But the Scottish origin of the testator, and his connection with Montrose, were only used as arguments to show that he contemplated the purchase of land in Scotland—a conclusion which one of the reasons appended to the appellant's case urged the House to adopt "even if he were domiciled in England." For some reason, doubtless a sufficient one, it was the common ground of argument that the will was governed from first to last by English law. There is not a trace in the reported statements, arguments, or judgments that anybody asked what would be the effect of a will not governed by English law, which is the question now propounded to their Lordships.

It is true that Story, J. (*Conflict of Laws*, § 446), and Mr. Westlake (*Private International Law*, § 165) both treat the decision as covering the case of a foreign will. But on examining the case that appears to their Lordships to be a misapprehension of the point really decided. So far as they know, the present question is wholly untouched by authority.

The Attorney-General dwelt on the amount of land which might be brought into mortmain if such bequests as these were allowed to take effect. Such considerations can hardly influence the construction of a statute except so far as they may appear to have been present to the minds of its framers. Their Lordships can hardly suppose that any one would feel alarm at the idea of foreigners giving large sums of money to English purposes; and if it be true that this is the first case of its kind to come into court, the experience of a century and a half tends to prove the futility of any such alarm. But, however that may be, their Lordships must construe the words of the statute according to their plain meaning, and leave it to the legislature to enact further prohibitions, if found expedient.

The result is that their Lordships will humbly advise Her Majesty to discharge the order of the full court, except so far as it deals with the specific chattels and with costs. This will in effect restore the judgment of Mr. Justice A'Beckett. It has seemed right to both the courts below that the costs of all parties to the litigation should be paid out of the testator's estate, those of the plaintiffs, who are the executors, being taxed as between solicitor and client. Their Lordships

have been asked to follow the same course in disposing of the costs of this appeal; and the residuary legatees raise no objection. Their Lordships will order accordingly.¹

IN RE PIERCY.

CHANCERY DIVISION. 1894.

[Reported [1895] 1 Chancery, 83.]

BENJAMIN PIERCY by his will, dated December 5, 1883, devised and bequeathed all his real and personal estate wheresoever to trustees to sell and convert into money all such estates, to invest the proceeds in English securities or land, and to apply the income for the benefit of persons named, and for charity.

An order for administration was made, which, among other things, directed "an inquiry what was the testator's estate and interest in lands situate elsewhere than in England, and whether such estates passed by the testator's will and were validly devised on the trusts thereof, and, if not, who are entitled to such lands, and for what estates and interests."

The testator was the absolute owner of a large extent of land in Sardinia. The opinions of a number of Italian advocates were taken as to the validity and effect under Italian law of the devise contained in the will as regarded land in Italy.

The following provisions of the Italian Civil Code were the most material:

"i. Preliminary directions as to the interpretation and application of the law in general.

"Art. 8. Successions by law or under testamentary disposition, whether as regards the order of succession, or as to the measure of the rights of succession, or the intrinsic validity of the disposition, are regulated by the national law of the person whose estate is in question, whatever may be the nature of the property, or in whatever country it may be situated.

"Art. 9. . . . The substance and effect of testamentary dispositions are regulated by the national law of the persons making them. . . .

"Art. 12. Notwithstanding the provisions of the preceding articles, in no case shall the laws, acts, or judgments of a foreign country, nor private dispositions or agreements, derogate from the prohibitive laws of the kingdom concerning either the persons, the property, or the acts; nor from the laws in any way concerning public order and morality (*il buon costume*).

¹ *Acc. Crum v. Bliss*, 47 Conn. 592; *Healey v. Reed*, 153 Mass. 197, 26 N. E. 404 — Ed.

“ ii. Civil Code.

“ Art. 899. Any condition imposed upon an heir or legatee, no matter how expressed, that he is to retain the property, and hand it over to a third party, is a trust substitution. Such substitution is forbidend.

“ Art. 900. The invalidity of the trust substitution does not affect the validity of the institution of the heir or legatee to which it is attached ; but it invalidates all the substitutions, even those of the first degree.”

This code came into operation in 1866, and made very considerable changes in the laws of Italy previously in force as to land.

In 1889 the executors mortgaged a part of the testator's land in Sardinia to an Italian bank for £20,000. They afterwards sold other portions of the land. Proceedings were also taken in the Italian court with reference to the registration of the testator's property in Italy, for the purpose of ascertaining the duty to be paid thereon according to Italian law.

At the time when this summons was heard, the testator's brother and sister were both dead.¹

NORTH, J. (after stating the provisions of the will, as to which he said no difficulty could arise with respect to the testator's English property, or property which was to be dealt with according to English law, referred to some of the clauses of the Italian Code and the opinions of the Italian advocates and to the facts, and continued) :

The question is, What is the position of matters as regards the real estate in Sardinia? It is not necessary for me to decide the question whether, under Italian law, the trustees take “as heirs,” or whether the testator's children and brother and sister take “as heirs,” because *quâcunque viâ* the will is good. If the trustees take as heirs, then everything beyond is “trust substitution,” which would not be good according to Italian law, but the gift to the heirs would stand. If, on the other hand, as I think, the trustees are not the heirs, but the testator's children and brother and sister are the heirs, then, in my judgment, according to the preponderating weight of opinion, coupled with the evidence derived from what has actually taken place, the trustees have, according to Italian law, a clear power to sell the testator's real estate in Sardinia without any interference on the part of the persons beneficially interested in it. Therefore the direction given by the will to the trustees to sell the estate is perfectly good according to Italian law.

Then the next question is as to the application of the proceeds of sale. With respect to that, in my opinion, the will is perfectly good, because the application of the proceeds is not in any way inconsistent with the Italian law. The Italian law relates to the land ; it determines how the land is to go, and regulates the rights of the various persons interested in it. When an absolute sale has taken place, the

¹ The statement of facts is condensed from that of the Reporter, and arguments of counsel are omitted. — ED.

Italian law still applies to the land in the hands of the then owner or owners, but it has nothing whatever to do with the proceeds of sale, after the land has been placed outside the scope of the will by a disposition which is valid according to Italian law.

Then, as regards the proceeds of sale, is there anything in Italian law which renders it illegal for the testator to do what he has done? The testator has directed that the proceeds of the sale of the land — that is, money to be obtained by the English trustees — is to be received by them, to be invested upon English securities, and then to be held by the trustees upon the trusts declared by an English will in favor of English beneficiaries. No one suggests that there is anything in Italian law forbidding this. It is, indeed, said by one of the Italian advocates that the land is the “patrimony,” and that, when the land is sold, the proceeds of sale — the money — is still the “patrimony.” What is the law as to that? It depends altogether upon the person to whom the money belongs. No doubt, if the money belongs to an owner who is subject to Italian law, whatever the Italian law forbids as to trusts must be observed, and if any person owning this property is subject to Italian law, and attempts to create a trust which the Italian law forbids, then, according to Italian law, the trust would be void. But when there is an English owner of money arising from the sale of land which belongs to other persons, and is subject in their hands to Italian law, there is nothing in Italian law to make that money itself subject to Italian law; and therefore, in my opinion, the proceeds of sale, when received by the trustees in pursuance of the valid exercise of the power of sale which they have according to the Italian law, pass entirely by the testator’s will, because the disposition is good according to English law, and is in no way at variance with Italian law, — meaning now by “Italian law” not merely anything which is expressed in the Italian Code, but anything contrary to “good custom” (whatever that may mean), — for the Italian law does not profess to regulate the disposition of English securities passing under the will of an Englishman to English legatees. In my opinion, therefore, the trust for sale being valid, the application of the proceeds of sale directed by the will is valid also.

Then the only question remaining is this. The trust has not yet been entirely executed, and at the present moment a part of the testator’s Italian land remains unsold, and is, therefore, subject to the law of Italy. The enjoyment of that land in the meantime, until it has been sold, is not in any way affected by the trust for sale, which has not yet been executed. We must look, therefore, to the Italian law to say what is the right to enjoy the land in the meantime, before the sale has actually taken place. I will take, first, the case of the testator’s widow. It seems to me clear that, according to Italian law, she is a “usufructuary,” in the sense that the disposition in her favor for life is perfectly good, and that the gift to the testator’s children and brother and sister, subject to that usufruct, is a good disposition.

Then comes the question of the "trust substitution"; and as to that, I come to the conclusion upon the evidence that the property is unconverted during that limited period. The Italian law applying, there can be no "trust substitution," and, that being so, the attempt to settle the shares on the children and the brother is not valid. As regards the sister, there is no question, because she takes absolutely in any case. As regards the children, to the extent of one moiety of their shares, and the brother as to the whole of his share, there is an attempt to settle. With the exception of the heir at law, Robert Charles Piercy, and the brother (who is dead), none of these persons raise any question. According to the Italian law they take absolutely, and the trusts over are ineffectual; but with those two exceptions they all say, "We wish to give effect to the testator's will in this respect; we are desirous that the income of the property until conversion shall, so far as our interests go, be applied in the same way as our shares of the income to arise from the proceeds of the conversion directed by the will will go after the conversion has taken place." There is nothing, in my view, contrary to Italian law in their saying that they wish their shares of the income of the unsold land to be applied in the same way as if they were shares of the income arising from the proceeds of sale after the conversion had taken place. The heir at law, however, does not elect or waive any right which he may have, and it is unnecessary for me to decide anything as to his share at present. So long as he lives, and the land remains unsold, he will, of course, be entitled to receive the income of his share, whether the trusts in favor of his children are good or bad, and no question between him and his children, or any other person, can possibly arise. It may be that all the land will be sold during his lifetime, and the question will never arise as between him and his children. But it is possible that he may die while part of the land remains unsold, and the question may then arise between him and his children. Any directions, therefore, which I now give must be without prejudice to any question between Robert Charles Piercy on the one hand, and, on the other hand, any person who may claim upon his death to be entitled to his one-eleventh of the income to arise from any part of the Italian property then remaining unsold, until the conversion thereof.

The question as to the brother's share of the income of the unsold land must be left open in the same way; as he has died recently, and although his representatives are before the court, and bound by my decision on the main questions, they are not prepared to consider or discuss this subordinate question at present; and possibly it may never be raised.¹

¹ *Acc. Ford v. Ford*, 80 Mich. 42; *Jenkins v. G. T. & S. D. Co.*, 53 N. J. Eq. 194, 32 Atl. 208; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413; *Ford v. Ford*, 70 Wis. 19.

So of a bequest to be sent into another State and there held in trust. *Sickles v. New Orleans*, 80 Fed. 868; *Vansant v. Roberts*, 3 Md. 119; *Chamberlain v. Chamberlain*, 43 N. Y. 424. — Ed.

STAIGG v. ATKINSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1887.

[Reported 144 *Massachusetts*, 564.]

HOLMES, J. This is an action brought by a widow to recover one-third of the proceeds of land in Minnesota formerly belonging to her husband, and sold without prejudice. The defence is, that she is barred by having accepted the provisions of her husband's will. The husband made a will while domiciled in Rhode Island, providing for the plaintiff, but not declaring the provision to be in lieu of dower, and then changed his domicil to Massachusetts, where he died. If he had died domiciled in Rhode Island, and the land had been situated there, the provisions of the will would not have prevented the plaintiff from recovering dower; and it has been decided, in a case between the same parties, that the change of domicil did not affect her right in Rhode Island land. *Atkinson v. Staigg*, 13 R. I. 725. If he had been domiciled and had made his will in Minnesota, the plaintiff would have been entitled by statute to the one-third which she claims; and, as there is no statute to the contrary, the provisions of the will would not have put her to an election. Gen. Laws of Minn. 1875, c. 40; *In re Gotzian*, 34 Minn. 159, 163, 164; *Reed v. Dickerman*, 12 Pick. 146, 149; *Ellis v. Lewis*, 3 Hare, 310. If, finally, the land had been situated in Massachusetts, and the will executed here, the plaintiff would have been compelled to elect between her dower and the will. Pub. Sts. c. 127, § 20; St. 1861, c. 164, § 1. So far, there is no dispute between the parties.

On the foregoing statement, it is obvious that the defendant cannot prevail, unless the rule which would govern if the land lay here also governs the present case. It is contended that that rule does govern, on the ground that the Massachusetts statute is a statute of construction, reading a clause of universal application into the will, to the effect that the provision made for the widow is in lieu of dower or substituted statutory interests in all lands, wherever situated; that the will is to be construed by the law of the domicil of the testator at the time of his death; and that, if the will so construed makes an acceptance of its provisions a waiver of dower, etc., the law of Minnesota would enforce the election made by such acceptance. *Washburn v. Van Steenwyk*, 32 Minn. 336.

But we cannot admit that a rule of construction, properly so called, not known to the law of the party's domicil when he made his will, is necessarily to be imported into it by reason of his dying domiciled elsewhere. For purposes of construction, it is always legitimate to consider the time when, and the circumstances in which, the will was made, and we think the law under which it was made is one of those circumstances. We are speaking only with reference to a case like the

one before us, not to a question like that in *Harrison v. Nixon*, 9 Pet. 483, 504. The testator was at liberty to make his gift to his wife in lieu of, or in addition to dower, as he saw fit. Which it should be, he had to consider, if he ever considered it, when he drew his will. He drew his will under a system by which the gift was in addition to dower unless he expressed the contrary, and he did not express the contrary. We are at a loss to see why his words should be held to acquire a new meaning upon his moving into a State where testamentary gifts are in lieu of dower unless shown to be in addition to it. *Atkinson v. Staigg*, *ubi supra*; *Holmes v. Holmes*, 1 Russ. & Myl. 660.

In view of our construction of the Massachusetts statute, it is not necessary to consider what was the effect of moving into Massachusetts with regard to Massachusetts land. The plaintiff has never made any claim upon it. See *Shannon v. White*, 109 Mass. 146. Neither need we pass upon the plaintiff's argument, that the general law of Minnesota should be accepted here as determining the construction of the will, so far as concerns the effect of accepting its provisions upon the plaintiff's right to Minnesota land. It would follow from that argument that the plaintiff would have been barred of her dower in the Massachusetts land, even if the testator had not moved from Rhode Island.

The case of *Jennings v. Jennings*, 21 Ohio St. 56, relied on by both sides, was the case of a West Virginia will, giving the wife certain interests in land in Ohio, and it was intimated that, with regard to Ohio lands, she was put to her election between the will and her dower, although West Virginia preserved the common law rule allowing her to claim dower in addition to what was given by the will. We understand this case to go on the ground that the law of the place of the land given to the widow by the will was to determine whether she was put to an election or not, at least with regard to land in the same jurisdiction, claimed outside the will. Thus construed the case helps neither party. The case of *Washburn v. Van Steenwyk*, 32 Minn. 336, which was put in evidence, is opposed to the plaintiff's contention. See *Van Steenwyk v. Washburn*, 59 Wis. 483, 510.

But we need not pursue this branch of the case further, because, in our opinion, the Massachusetts statute does not purport to affect lands outside the State, either by way of construction or otherwise.

The language of the Pub. Sts. c. 127, § 20, is as follows: "A widow shall not be entitled to her dower in addition to the provisions of her deceased husband's will, unless such plainly appears by the will to have been the intention of the testator." In the St. of 1861, c. 164, § 1, the language is: "If she makes no such waiver she shall not be endowed of his lands, unless it plainly appears by the will to have been the intention of the testator that she should have such provisions in addition to her dower." Both of these acts, in form, are directed at dower, not at the construction of wills. The statutes give the widow dower: Pub. Sts. c. 124, § 3; Rev. Sts. c. 60, § 1; and allow her six

months in which to waive the provisions made for her by will. Pub. Sts. c. 127, § 18 · St. 1861, c. 164, § 1 ; Rev. Sts, c. 60, § 11. They then go on to say that she cannot have her dower unless she waives the will, but add that the husband may make his bounty an addition to her dower if he sees fit.

No doubt the statute was intended to change the common law rule. But the fact that it approaches the subject from the side of dower, and not from the side of the will, shows that it was only intended to operate with regard to Massachusetts lands, whether described as a statute of construction or as a statute relating to dower. Of course, Massachusetts would not attempt to legislate concerning dower in another State. Taking the view which we have expressed, we have not considered whether the statutory one-third in fee given by the law of Minnesota would be included under the word "dower" in our statute.

It was suggested, for the defendant, that the widow could not claim under the will in one jurisdiction and against it in another. But, on our construction of the will and the Massachusetts statute, she does not claim against the will by claiming her third of the Minnesota land outside of it.

We are of opinion that the plaintiff's interest is bound to contribute to the payment of debts secured by mortgage upon the Massachusetts lands. By the old law, until changed in England by the St. of 17 & 18 Vict. c. 113, if other land was charged with the payment of debts, it had to exonerate land which the testator had mortgaged. And this rule was not based upon the fact that the devise of the mortgaged land was specific, as it would have been even if residuary, or upon any notion of the intention to be drawn from the will; undoubtedly, land not passing by the will, but acquired and mortgaged after the will was drawn, would have been exonerated. The rule was put upon the ground that the debt was a general debt, like any other, and the mortgaged land only a security, and therefore that the funds liable for general debts must pay it. *Bartholomew v. May*, 1 Atk. 487. *Tweedale v. Coventry*, 1 Bro. C. C. 240 ; *Serle v. St. Eloy*, 2 P. Wms. 386. See *Hewes v. Dehon*, 3 Gray, 205, 207 ; *Plimpton v. Fuller*, 11 Allen, 139. It followed that, when other land and the mortgaged land were both charged together, they were held to contribute ratably. *Carter v. Barnadiston*, 1 P. Wms. 505 ; *Middleton v. Middleton*, 15 Beav. 450 ; *Harper v. Munday*, 7 DeG. M. & G. 369. And the same principle would apply when all the lands are charged by statute instead of by will.

By the Minnesota statute, the plaintiff's interest is "subject in its just proportion with the other real estate for such debts of the deceased as are not paid from the personal estate," so that, apart from the will, the plaintiff's one-third would stand no better than the other two-thirds. Taking into account this and the general course of legislation which makes land liable for debts, we think that it would be too artificial to interpret the testator's general direction to pay debts as

indicating an intent to charge the interests passing by the will in exoneration of the plaintiff's one-third, even as against residuary devisees. *Hewes v. Dehon*, *ubi supra* (see *Harris v. Watkins*, Kay, 438) although we assume that the residuary devise was not specific, so far as it affected the Minnesota land, as it was not with regard to the land in Massachusetts. *Blaney v. Blaney*, 1 Cush. 107; *Thayer v. Wellington*, 9 Allen, 283, 296. The plaintiff prevails upon a somewhat technical principle, and hardly can complain if she is held to stand upon the footing on which the Minnesota statute meant to put her.

*Judgment for the plaintiff for \$2,205.69.*¹

CAMERON v. WATSON.

HIGH COURT OF ERRORS AND APPEALS, MISSISSIPPI. 1866.

[Reported 40 *Mississippi*, 191.]

HANDY, C. J.² This is an appeal from the Probate Court of Bolivar County. An issue of *devisavit vel non* was made up in that court on the petition of D. S. Cameron, executor of George G. Torrey, deceased, filed to contest the validity of the will of Mrs. Frances M. Torrey, who was the wife of said G. G. Torrey, and which was propounded for probate in the said court. The issue was made up, and tried before a jury, who found a verdict establishing the will; and a motion to set aside the verdict and grant a new trial was overruled by the court, and a bill of exceptions taken thereto.

¹ A will of personal property is to be interpreted, in the absence of strong evidence of a contrary intention, according to the law of the domicil. *Yates v. Thompson*, 3 Cl. & F. 544; *Harrison v. Nixon*, 9 Pet. 483; *Rockwell v. Bradshaw*, 67 Conn. 8, 34 Atl. 758; *Lincoln v. Perry*, 149 Mass. 368; *Adams v. Farley* (Miss.), 18 So. 390; *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. 252; *Benbow v. Moore*, 114 N. C. 263, 19 S. E. 156; *Crandell v. Barker*, 8 N. D. 263, 78 N. W. 347; *Gowan v. Gowan*, 17 Scot. Jur. 215. This is so held even where the will was made abroad in the language of the foreign country. *Caulfield v. Sullivan*, 85 N. Y. 153.

The same rule is generally followed in interpreting a devise of real estate. *Guerard v. Guerard*, 73 Ga. 506; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673; *Ford v. Ford*, 70 Wis. 19. *Contra*, *Yates v. Thompson*, 3 Cl. & F. 544, 588 (*semble*); *Jennings v. Jennings*, 21 Oh. S. 56.

Where the courts of the domicil have interpreted the will, courts in other States should therefore follow the interpretation. *White v. Keller*, 68 Fed. 796; *Ford v. Ford*, 80 Mich. 42. But see *Appeal of Clarke*, 70 Conn. 195, 39 Atl. 155; *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210.

If the testator changes his domicil before his death, the will is to be interpreted by the law of his domicil at the time the will was made. *Maxwell v. Hyslop*, L. R. 4 Eq. 407; *Atkinson v. Staigg*, 13 R. I. 725; 13 Clunet, 605 (Germany, 10 Feb. '85).

When according to the intention of the testator or according to the law governing the dispositions of the will a legatee must elect between the provisions of the will and his rights outside the will, election once made at his domicil will be everywhere effectual. *Washburn v. Van Steenwyk*, 32 Minn. 336; *Wilson v. Cox*, 49 Miss. 538. — ED.

² The opinion only is given. — ED.

It appeared in evidence that an antenuptial contract had been entered into between the said G. G. Torrey and the testatrix (then Mrs. Frances M. Walker), dated November 5, 1857, which recited that the said Frances was seised and possessed of a large and valuable estate, real, personal, and mixed, situate and being in the State of Arkansas, and that said Torrey was seised and possessed of a considerable estate in the State of Mississippi; and that a marriage was intended shortly to be had and solemnized between the said parties, and that it was agreed by them, that, notwithstanding said marriage, they should have no claim whatever, the one upon the aforesaid separate estate of the other, or upon the rents, issues, and profits thereof, but the same should remain, continue, and be to them respectively and severally, or to such uses as they should think fit severally to appoint; and therefore the said Frances, with the consent of said Torrey, conveyed all her estate in the State of Arkansas, of what kind soever, and wherever situated, to Gaines in trust, to permit her to keep and enjoy the said estate, with the rents, issues, and profits thereof, to her sole and separate use, or to the use of such person or persons as she, by writing under her hand, or by last will and testament, may appoint, and that said Torrey should not intermeddle therewith; and that the same or any part thereof should not be liable to his control, debts, or disposal, but should remain wholly in the power, and at the disposal of the said Frances; and in further trust, that the said trustee would from time to time convey said estate, or any part thereof, to such persons as she should appoint by writing under her hand, or by an instrument in the nature of a last will and testament, with full power on her part, should said estate, or any part thereof, be sold during her life, and appointed by her to be conveyed, to receive and dispose, for her own proper use, of the moneys arising from such sale or sales, and that said Torrey should not intermeddle therewith, and that the same should not be liable to his control, debts, or disposal, but should remain wholly in her power and disposal, to use as she pleased during life, and to dispose of at her death by last will and testament, or an instrument of appointment in the nature thereof. And the said Torrey thereby covenanted that her estate, and all the income, rents, profits, and proceeds thereof, should at all times thereafter remain and be, to and for the uses and purposes before expressed, and that said Frances might from time to time dispose of, according to her will and pleasure, said increase, rents, income, and profits, and her estate as therein provided for. And the said Frances released all claim on the estate of said Torrey.

This contract describes the said Torrey as being of the county of Bolivar, State of Mississippi, and the said Frances as being of the county of Chicot, in the State of Arkansas; and it was duly recorded in the proper offices in Bolivar County and in Chicot County.

The will propounded purports to be an instrument of appointment in the nature of a last will and testament, made in virtue of the foregoing

deed of settlement, and bears date 25th March, 1861; and its execution and publication in Chicot County, Arkansas, and the attestation of the subscribing witnesses, so as to make it a valid will both as to real and personal estate, were duly proved. It was admitted, on the trial, that G. G. Torrey and Frances M. Torrey had no issue born of this marriage; that she had no child at the time of the marriage to Torrey; that, when the paper propounded as a will was executed, she resided in this State; and that at the date of the execution of that paper, and when she died, she was the wife of G. G. Torrey; that he survived her, and that he resided at the time of his marriage with Frances M. Torrey, in Bolivar County in this State, and continued so to reside up to the time of his death.

It is conceded, by counsel for the appellant, that the antenuptial contract in this case conferred on Mrs. Torrey the power to dispose of her separate property, by will or otherwise, according to the provisions of that agreement; but it is insisted that her power to do so was limited by the terms of that instrument to her separate property in Arkansas, and to the "income, issues, rents, proceeds, and profits" thereof, and that she had no power, under the agreement or otherwise, to dispose of real or personal property in this State; that, as it was not shown that there was any property in this State that she had the power to dispose of, under the agreement, the will should not have been admitted to probate in this State for any purpose.

This position cannot be maintained to the extent stated. It appears, by the evidence, that Mrs. Torrey had her domicile in this State, from the time of her marriage to G. G. Torrey to the time of her death, and that she died here. The general rule is, that the capacity of a testator to make a will, and the rules regulating the disposition of personal property, depend on the law of the domicile; and, to that extent, that the matter of probate belongs to the tribunal of the domicile; where, therefore, the testator has, by law, the general power of disposition by will, it is immaterial, with reference to the question of probate, whether there was property in this State to be affected by the will or not; for, in such a case, the matters for determination would be, whether the testator was competent, by our laws, to make a will, and whether it was executed according to those laws. If these facts were found in favor of the will, it would, of course, be admitted to probate here; and it would affect all personal property embraced in it, wherever situate, though it would not convey real estate situate in another State, unless executed according to the laws of that State.

This is the rule in cases where a general power of disposition by will exists. Does a different rule prevail where the power of disposition is limited to particular circumstances or conditions on which its exercise depends?

When a will is propounded, in such a case, the court finds that the party had not the general power to make it, and that its validity depends on a special grant of power to make it, under particular

circumstances; and the question must necessarily arise, whether those circumstances exist. In this case, the power was not general, but special, and restricted to property in Arkansas and its proceeds. The first question, then, that must arise on the application to probate, would be as to the competency of the testatrix to make a will, and it would be found that that power was derived solely from the antenuptial agreement, and was limited by that agreement to her property in Arkansas and its proceeds. The court would find, on examination of that instrument, that the testator was empowered to dispose of her lands and personal property in Arkansas, and that the will had been executed and was proved according to the formalities required by our laws. It would have jurisdiction, by reason of the domicile, to give full effect to the will as to the personal property in Arkansas, embraced in the deed of settlement, wherever it might subsequently be removed, and the proceeds of the real and personal estate embraced therein, wherever situate; and, of course, the probate would be granted. The probate, though general, would give effect to the will only so far as the testator had power, by virtue of the antenuptial agreement, to dispose of the property mentioned in it.

It is clear, therefore, that the court had jurisdiction to grant probate of the will as to the personalty and the proceeds of the lands mentioned in the deed, wherever they might be found; and that it is no objection to its exercise, that the property was not in this State.

It is next objected that the probate was general, and that it did not restrict the operation of the will to the property in Arkansas, and its rents, issues, profits, and proceeds.

But this is immaterial. The propriety of the probate must be tested by its legal effect; and that clearly was confined to the specific property mentioned in the deed of settlement, and the rents, issues, profits, and proceeds of it. When a will is propounded for probate, devising lands in another State, and personalty, it is customary and proper to admit it to probate generally, though it may not be executed in form, and cannot have the effect to convey lands in another State, as required by the laws of that State. So, when a will contains dispositions, some of which are valid, and others illegal and void, if the will be executed and proved according to the requirements of law, it should be admitted to probate as a duly executed and established will, leaving its legal effect to be afterwards determined. *Lusk v. Lewis*, 32 Miss. 300. And this is especially the case in the trial of an issue of *devisavit vel non*; for such an issue involves no other questions but the competency of the testator to make the will, and whether the instrument was executed with all the formalities required by law, and in all respects under such circumstances as to make it the free and true last will and testament of the testator. Questions of its construction and legal effect are plainly not embraced in such an issue, and should be left for subsequent adjudication.

The last ground of error insisted on is, that the instructions of the

court were contradictory to each other, so that the jury were left without any proper rule to guide them in determining the issue.

There is no error in the instructions except in the second, and that was given at the instance of the appellant, and he cannot complain of it. But no injury was done by it, for the verdict was correct, notwithstanding the erroneous instruction. In such a case the error in the instruction is not ground for granting a new trial, where it is manifest that the verdict was correct, upon the facts appearing in the record. *Fore v. Williams*, 35 Miss. 533.

Let the decree be affirmed, with costs.

IN RE MARTIN.

COURT OF APPEAL. 1900.

[Reported [1900] *Probate*, 211.]

APPEAL from the judgment of Sir F. JEUNE, President, allowing probate of a will.¹

LINDLEY, M. R.² The will which is in question in this case was made in this country by a Frenchwoman before her marriage, and was not attested as required by English law. By English law, by which I mean English law irrespective of all foreign law, the will is therefore clearly invalid. But foreign law must be taken into account. Those principles of private international law which are recognized in this country are part of the law of England; and on those principles the validity of the will, so far as it affects movable property, depends on the law of the domicile of the testatrix when she died. The domicile of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognized in this country and are part of its law. Until the question of the domicile of the testatrix at the time of her death is determined, the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a Frenchwoman, but it would be contrary to sound principle to determine her domicile at her death by the evidence of French legal experts. The preliminary question, by what law is the will to be governed, must depend in an English court on the view that court takes of the domicile of the testatrix when she died. If authority for these statements is wanted, it will be found in *Bremer v. Freeman*, 10 Moo. P. C. 306; see pp. 359 *et seq.*; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301; and *In re Trufort* (1887), 36 Ch. D. 600. In each of the last two cases a foreign court had determined the domicile, and the English court had also to determine it, and did determine it to be the same as that determined by the foreign court. But, as I understand those cases, the

¹ The statement of facts, and the judgment of Sir F. JEUNE, are omitted. — ED.

² Part of the opinion is omitted. — ED.

English court satisfied itself as to the domicile in the English sense of the term, and did not simply adopt the foreign decisions. The course universally followed when domicile has to be decided by the courts of this country proceeds upon the principles to which I have alluded.

But, further, the validity of a will of movables made by a person domiciled in a foreign country at the time of such person's death not only may, but must, depend on the view its courts take of the validity of the will when made, and on its subsequent revocation if that question arises. These questions may or may not turn on the domicile of the testator as understood in this country. For example, in this case it is agreed on all hands that by the law of France the will in question, being a holograph will made by a French subject, was valid when made, whatever her domicile may have been when she made it. It is also agreed on all hands that by French law marriage does not revoke the prior wills of the spouses. But the testatrix married a Frenchman in this country after she made her will, and the question whether her will was thereby revoked as to her movables is the real question on which this case turns.

By whatever court this question is to be decided, the English law of marriage, which in such a case involves and, indeed, turns on English views of domicile, must be considered. If this view be ignored, the effect of the marriage will be inadequately and, indeed, erroneously ascertained. If the domicile of the testatrix is to be treated as English, when she became a married woman her will was revoked by her marriage, for such is the law of England whatever the intentions of the parties may be: 1 Jarman on Wills, c. 7; but if her domicile was French, her will would not be revoked by English law, and still less by French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him. The effect of her marriage must, therefore, depend on the English view of his domicile. It would be useless, and, indeed, entirely misleading, to ask a French expert what effect the French law would give to an English marriage, without explaining the English law to him, and no explanation of that law would be adequate or correct if it excluded the English view of the domicile of the parties.

Having thus stated the principles which, in my opinion, ought to be applied to the case, I proceed to consider the facts and the evidence of the experts called at the trial. As already stated, the will was made in England by a Frenchwoman in the French language, and was a holograph will valid by the law of France whether she was then domiciled in England or France. It was made in 1870. She was in service in England, and this by French law rendered her domicile (in the French sense) English at that time. She afterwards set up a laundry business in London. Her principal establishment was therefore here, and, according to French law, she was clearly domiciled (in the French sense) in England. In May, 1874, she married a French refugee known by the name of Martin. He came over to this country in 1868, and made a living by

teaching French. There was no settlement, or anything in the nature of a settlement. The marriage was celebrated by a French Roman Catholic priest in a Roman Catholic church in the presence of a registrar. At the time of the marriage both the man and the woman signed a declaration stating that they were both *domiciliés* in London. They lived together in London for some years and carried on the laundry. In 1881, 1884, and 1888, leases of the laundry house were granted to the husband. In 1890 the husband and wife separated; he assigned the leases to her and returned to France, where he has ever since lived and lives now. His wife remained here and continued to carry on the laundry business until her death in January, 1895. It was believed that she had died intestate, and her brother obtained letters of administration to her estate. The will, which had been sent to France in 1870 and had been deposited with a notary, was brought forward recently by the testatrix's sister, who was constituted by it her residuary legatee. At her instance the letters of administration have been revoked, and probate of the will has been granted. The will has been judicially recognized as valid in France. But as the proceedings there were *ex parte*, I attach little importance to this fact, although no appeal has yet been made to set aside the order so obtained.

The learned President decided, and, in my opinion, rightly decided, that the domicile of the testatrix in the English sense was French when she died. It became necessary, therefore, to determine whether by the law of France her will was valid when she died. Experts were called and examined and cross-examined at great length on a number of points, many of which are not now, at all events, material or in controversy. The experts all agreed that the will was valid when made. They also all agreed that according to French law the testatrix was domiciled (in the French sense) in England when she made her will and when she married. They also all agreed that, according to French law and in the French sense, her husband was domiciled in England when he married. Treating the husband and wife as domiciled in England when they married, they differed as to the consequences. MM. Gaustalla, Gorostazu, and Mesnil think that the marriage revoked the will. M. Mesnil is quite clear upon the point; the others are less so, but they, I think, take the same view. M. Astoul, when first called, stated that the marriage did not revoke the will; that it depended on nationality, not domicile, in the French sense. When recalled he apparently adhered to his opinion, but considered that the revocation might depend on the intention of the parties and on the adoption of the matrimonial *régime* by the spouses.

All these experts based their opinion on their view that at the time of the marriage the parties were domiciled in England, and they applied the English law of marriage to that state of things. But, as I have already pointed out, the English law of marriage, when considered with reference to its effect on property, involves, and in a case like this cannot be severed from, English views of domicile. The learned Presi-

dent came to the conclusion that the domicile of the husband at the time of the marriage was in France, not in England. But he also came to the conclusion that both husband and wife intended to marry according to English law, and that the English matrimonial law should and would govern their future property. He further considered that the law by which wills are revoked by marriage was not part of the English matrimonial law, but part of the English testamentary law, and that this law did not apply to the case. I confess I have great difficulty in adopting this view of the case. If, as the President considered, the parties were (according to English views) domiciled in France when they married, their marriage would not revoke their previous wills; and the French experts should have been told so, and should have been directed that their assumption of an English domicile was inadmissible. It is plain from their evidence that, according to French law, the domicile (in the French sense) of both husband and wife was in England and not in France, both when the marriage took place and when the testatrix died. I have no doubt that this conclusion was quite correct; but for the reasons I have already given I consider it necessary to examine the effect of the marriage according to English views of domicile.

I proceed, therefore, to inquire whether the President was right in his view that the husband was domiciled (in the English sense) in France and not in England when he married. We start with the fact that the husband had a domicile of origin in France. According to English law, the burden of proving that he lost that domicile and acquired an English domicile is on those who assert that he did so. Further, the domicile to be acquired must be domicile, not in the French sense, but in the English sense. The experts all tell us that he lost his French domicile, in the French sense, by coming to England and setting himself up as a teacher of languages here. But to acquire an English domicile in the English sense, not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently, or for an indefinite period: see the authorities collected in Dicey's *Conflict of Laws*, pp. 104 *et seq.* I cannot come to the conclusion that this intention is proved. . . .

The domicile of the testatrix being French when she made her will and when she died, it became necessary to ascertain the effect of her will on her movable property according to French law. The husband being, in my opinion, domiciled in France when she married, it became necessary to ascertain the effect of such marriage by French law upon her will; and if, in order to ascertain this, it became necessary for the French experts to be told what the English law was, they should have been told that it depended on the view which an English court would take of the domicile, in the English sense, of the husband; and if I am right in my view of his domicile, the experts should have been told that by English law the marriage in this case did not revoke the wife's will. It was not necessary or, indeed, proper on this occasion to pursue the inquiry further and to see what matrimonial *régime* the parties intended

to adopt. It is not necessary to cite authorities to show that it is now settled that, according to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense. The authorities will be found collected in Foote's International Law, 2d ed., pp. 315-321, and Dicey's Conflict of Laws, pp. 648 *et seq.* This being clear the will was not revoked; and not revoked it was clearly valid as regards the wife's movable property. Section 18 of the Wills Act does not apply to the wills of foreigners who die domiciled abroad (Deane's Wills Act, note to § 18, cites an authority for this), and the effect of the marriage was not to vest the wife's property in the husband. French law did not so vest it, neither did international law as understood and administered in this country. The English law applicable to English people, and according to which a woman's personal property formerly vested in her husband on marriage, and according to which her will was revoked by marriage even before the Wills Act, could not, on principle, apply to French spouses married in England, but (according to English views) domiciled in France when they married.

In my opinion the will has been properly admitted to probate; but it will not apply to leasehold property, for that is not regarded as movable property, to which the *lex domicilii* is applicable. Dicey, p. 72. A great quantity of expert evidence was taken on the difficult question whether the French law of *communauté des biens* was to be applied to the property of these persons. As I understand the expert evidence, the question turns not only on the marriage, but on the effect of what the husband and wife did afterwards. This question may arise hereafter, but it does not arise now, and I purposely, therefore, say nothing more about it.

VAUGHAN WILLIAMS, L. J.¹ I agree in the conclusion of Sir F. JEUNE that the husband and wife intended to keep an establishment in England, and that they intended to marry under English law, and to adopt it as their matrimonial law; but I base this conclusion on the fact, which Sir F. JEUNE does not accept, that at the date of the marriage the husband had an English domicile. . . . Then at that time his wife's movables became his property; and I think that, his wife's property in the movables having thereby ceased, it follows, quite independently of the 18th section of the Wills Act, that this loss of the power of disposition put an end to her will while it was still ambulatory, and rendered it of no effect, and that nothing but republication could revive it. . . .

*Appeal allowed.*²

¹ Part of this opinion, and the concurring opinion of RIGBY, L. J., are omitted. — ED.

² The question of revocation of a will of personalty is to be determined by the domicile of the decedent at the time of the alleged revocation. Goods of Reid, L. R. 1 P. & D. 74. Of a will of real estate, by the law of the situs. Ware v. Wisner, 50 Fed. 310; Evansville Ice & C. S. Co. v. Winsor, 148 Ind. 682, 48 N. E. 592 (*semble*). — ED.

QUARTIN v. QUARTIN.

COURT OF CASSATION, FRANCE. 1847.

[*Reported Sirey, Recueil, 1847, I. 712.*]

MR. QUARTIN, an English subject, died February 3, 1841, in Abyssinia, leaving a holograph will dated at Paris, January 31, 1839, and deposited with a notary of that city, by which he left half his property to his two sisters Marie and Charlotte, and the other half to his father and mother for life, with remainder to another sister and a brother. Soon after, Miss Marie Quartin, one of the legatees, also died in France, leaving a holograph will dated at Paris March 3, 1842, and deposited with a notary of that city, by which she named her sister Charlotte as universal legatee. Mr. Quartin senior petitioned for nullity of both instruments, on the ground that both testators, being English subjects, were incompetent to make a will, even in France, in the holographic form, which is not permitted by the English law.¹

On August 8, 1844, the Civil Tribunal of the Seine gave judgment.

THE TRIBUNAL. It is generally admitted as international law that the form of deeds is subject to the laws, usages, and customs of the country where they are executed; this principle, required by the nature of things, is of universal application, and governs all acts whatever, public and private alike, provided no doubt exists where they took place.

It is admitted that the wills in question, written by the testators themselves, are written, dated, and signed, and satisfy all the conditions necessary to their validity according to the Civil Code, under the jurisdiction of which they were made. Quartin claims that they are null for the single reason that the testators, being English subjects, were incapable in France of making holographic wills, since the law of their country recognizes only published wills. But suppose holographic wills are not good in England, the principle would be inapplicable in France. The argument of Quartin rests upon a confusion between the rules which concern the capacity of the person and those which concern the intrinsic form, the nature and the character of acts. If it is true that the statute personal follows the person wherever it finds him, it is also true that it is only for his status, his quality of major or minor, the extent and the limits of his rights and of his capacity; but the statute personal remains a stranger to the form and character of acts executed in a State whose laws and statutes determine the mode and manner of doing the acts. One easily comprehends that all that pertains to the solemnization of contracts, to their substantial elements, their nature, their form, belongs exclusively to the law of the country where they come into existence; a law to which a foreigner while within the

¹ Part of the case, involving another question, is omitted. — Ed.

country must conform, if he desires its protection for his right and the exercise he has made of his right. If this were not true a foreigner in France might be unable to accomplish a certain disposition which was permitted by the law and customs of his country only in a certain special form prohibited by our law.

It results from these principles that the two wills, being in conformity with the provisions of the Civil Code, which governs them according to the rule *locus regit actum*, are valid as to form; and their effects alone are to be examined.

The English statutes (differing from our own laws) make no reserve in favor of parents, and leave to children the entire power of disposition over their own property. Therefore as an English subject, the late Dillon Quartin might have disposed of all his property in favor of his brothers and sisters, or even of strangers. The property of the deceased in France is exclusively movable; and on principle movables follow the condition and capacity of the person. . . . It follows that Charlotte Quartin is entitled to half the succession of Dillon Quartin. . . .

Appeal by Mr. Quartin senior; but on July 7, 1845, the Royal Court of Paris gave judgment confirming the judgment of the lower judges and adopting their reasons. Appeal to the Court of Cassation.

THE COURT. The outward form and solemnization of acts are determined by the law of the country where they are executed. This principle is applicable to wills; and consequently the form of them is governed by the law of the country where the testator executes his will. Otherwise a foreigner might while outside his own country find himself unable to make a will, because of the impossibility of making use of the form required by the law of his domicile. Laws which determine the form in which a will ought to be executed do not touch the capacity of the testator, but only the outward solemnities which should accompany the expression of the testator's wishes. It follows that in deciding valid the will made at Paris by Quartin, an English subject, in the holographic form authorized by the French law, the judgment appealed from did not violate the law. *Appeal dismissed.*¹

¹ The form of a will is governed by the *lex loci actus*. 10 Clunet, 84 (Turin, 31 May, '81); 20 Clunet, 418 (Paris, 11 Aug. '92); see 20 Clunet, 955 (Genoa, 4 Aug. '91). A foreign testator may, however, legally adopt the forms used in his country. 22 Clunet, 847 (Seine, 28 June, '95).

The validity of a will is determined by the law of nationality or of domicile, at the death of the testator, whichever prevails in the country in question. By the law of domicile, 19 Clunet, 300 (Amsterdam, 31 Dec. '89); 19 Clunet, 1191 (Germany, 7 Jan. '90); 21 Clunet, 1077 (Austria, 13 June, '93.)

The right of the legatee to take depends on his law, 15 Clunet, 524 (Nancy, 14 Dec. '87). — ED.

SECTION III.

EXECUTION OF POWER.

IN RE PRICE.

CHANCERY DIVISION. 1900.

[Reported [1900] 1 Chancery, 442.]

STIRLING, J. Under the will of Lady Price the fund is to be paid and transferred in such manner as Madame Forfillier "shall by her last will appoint." The first question arises as to the word "will" which there occurs — whether it means any instrument recognized by the law of England as a will, or a will executed in accordance with the law of England. I shall first consider the three authorities which have been cited to me as bearing on this subject. The first is the case of *D'Huart v. Harkness*, 34 Beav. 324. There, under the will of an English lady, a sum of Consols was held upon trust for her daughter for her separate use for life, and after her decease upon trust for such persons as her said daughter "by her last will and testament in writing duly executed" should direct or appoint. The daughter was a Englishwoman by birth, but she married a domiciled Frenchman and resided in France till her death; she made a will, which was not attested, whereby she bequeathed the sum of Consols to her husband. This will was valid by the law of France, and had been admitted to probate in this country. It was held by Lord Romilly that the will was a valid execution of the power. It will be observed that, as regards the facts, that case is as near to the present case as one case can be to another. The material portion of the judgment is this, 34 Beav. 327: "A sum of money is given simply, to such person as the Baroness shall by her last will duly executed appoint. What does that mean? It means a will so executed as to be good according to the English law. Here it is admitted to probate, and that is conclusive that it is good according to the English law. The English law admits two classes of wills to probate; first, those which follow the forms required by 1 Vict. c. 26, § 9, and secondly, those executed by a person domiciled in a foreign country, according to the law of that country; which latter are perfectly valid in this country. Accordingly, where a person domiciled in France executes a will in the mode required by the law of that country, it is admitted to proof in England, though the English formalities have not been observed. When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not

mean any one particular form of will recognized by the law of this country, but any will which is entitled to probate here. A power to appoint by will, simply, may be executed by any will which according to the law of this country is valid, though it does not follow the forms of the statute."

The next case is that of *In re Kirwan's Trusts*, 25 Ch. D. 373, which came before Kay, L. J., when a judge of first instance. The facts of that case require some attention. The power there was by deed or will to be executed in the presence of two or more witnesses to appoint amongst children. The donee of the power was an English subject. His testamentary disposition consisted of two instruments; first, a will executed in accordance with English law, but invalid according to French law, and, secondly, a codicil not executed in accordance with English law, but valid according to the law of France. In order to have both will and codicil proved here, it was necessary to have recourse to Lord Kingsdown's Act, and the will and codicil, which together made the testamentary disposition, were admitted to probate by virtue of that statute. Now, the instrument which purported to execute the power was the codicil, which was unattested, and, consequently, was not an instrument falling within the terms of the power. Neither did it satisfy the requirements of the Wills Act. Upon that Kay, J. says (25 Ch. D. 379): "Now, the codicil was not attested, and therefore it did not fulfil the requisites either of the power or of the Wills Act (1 Vict. c. 26), but it was a good testamentary document under 24 & 25 Vict. c. 114. . . . This being a good testamentary instrument by the law of the domicile of George Saint Lo Kirwan, which I understand was France at the time, although not executed as required by the Wills Act, has under the act which I have referred to been admitted to probate in England, and the documents admitted to probate are two, *i. e.*, the will of the 3d April, 1862, and the codicil of the 9th of May, 1871." Then, after considering the effect of that, he goes on to say (25 Ch. D. 381): "It is a good testamentary instrument, and its only defect is its want of attestation. But the Wills Act says that 'no appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required,' that is to say, in the presence of and attested by two witnesses. The later act, 23 & 24 Vict. c. 114, does not refer to that clause, nor, indeed, does it refer to a power of appointment at all. It only does this: It makes a will executed abroad by a British subject a good will if it be such a document as is recognized as a will by the law of that place. But it does not at all touch or interfere with the negative provision in the Wills Act, namely, that no testamentary appointment can be made unless it is attested by two witnesses. Therefore, I do not think it would be possible to treat this codicil as being a good and valid appointment either at law or in equity." Now, I pause there to remark that the facts of that case are different from those of the present case in two respects: first, the power was of a different kind, and, secondly, the testamentary disposition was

admitted to probate only by virtue of Lord Kingsdown's Act, whereas here Lord Kingsdown's Act does not come into operation. Unfortunately, *D'Huart v. Harkness* was not cited in *In re Kirwan's Trusts*, and I have not the benefit of any observations of Kay, J., upon it, but it has been considered by Kekewich, J., in the recent case of *Hummel v. Hummel*, [1898] 1 Ch. 642. The facts stated in the head-note are as follows: "A daughter of a testator had under his will a general power of appointment by will over a share of his residuary estate. The daughter died in France, having while residing there made a disposition of her property by a writing signed by her but not attested, the writing being in form a valid will according to French law;" and it was held that the writing, even if admissible to probate under section 1 of Lord Kingsdown's Act, did not operate as an execution by the daughter of her general power of appointment by will, since it had not been attested by two or more witnesses as required by sections 9 and 10 of the Wills Act. The question which I have to decide really did not arise there, because the document relied on as an execution of the power had not been admitted to probate; but Kekewich, J., does consider the question whether, supposing it could be proved, it would be a good execution of the power, and he proceeds on the footing that the will could only be proved under Lord Kingsdown's Act. He says this, [1898] 1 Ch. 645: "It is, I will assume, . . . a valid will according to the law of France; but it is not a will that could under the provisions of the Wills Act be proved in this country. The question is, Can it operate as an exercise of a general power of appointment by will? As to that, the decision of Kay, J., in *In re Kirwan's Trusts*, is conclusive that it cannot, even if it had been a will that could be proved in this country. Is that decision inconsistent with *D'Huart v. Harkness*, where Sir J. Romilly, M. R., decided that a power to appoint 'by a will duly executed' is well exercised by a will good according to the law of the country of the testator's domicile, though ill executed according to the law of England? That case, as already mentioned, was not referred to in *In re Kirwan's Trusts*; but the latter is cited in a note on page 308 of 1 Williams on Executors, 9th ed., as the authority for the proposition that in the case of a will which is only valid by reason of the Act 24 & 25 Vict. c. 114, sections 9 and 10 of the Wills Act must be complied with. That appears to me to form the distinction between the two cases." Then he refers to Lord Kingsdown's Act. The opinion there expressed by the learned judge appears to me to be that *D'Huart v. Harkness* was not inconsistent with *In re Kirwan's Trusts*, upon the ground that the latter decision only applied to a case in which the will was proved under the provisions of Lord Kingsdown's Act. That act only applies to the wills of British subjects. Madame Forfillier was not a British subject but a French subject, and as a matter of fact the grant of letters of administration with the will annexed was not under Lord Kingsdown's Act at all. Therefore, looking at the authorities and having regard to the views taken

by Kekewich, J., I am of opinion that I ought to follow *D'Huart v. Harkness* and not *In re Kirwan's Trusts*. But I go further. I think that on principle *D'Huart v. Harkness* was well decided. The general rule on the subject is, as stated by Mr. Dicey (*Conflict of Laws*, p. 684), that "Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid" in England. It follows that the provisions of an English statute prescribing formalities with reference to wills do not apply to the wills of persons not domiciled in England.

In *Bremer v. Freeman*, 10 Moo. P. C. 306, it appears to have been contended that the provisions of section 20 of the Wills Act as to the revocation of wills applied to the wills of persons domiciled abroad. Lord Wensleydale, in delivering the judgment of the court, said, that for reasons referred to by him it was unnecessary to consider the point, but added (10 Moo. P. C. 359): "Their Lordships, however, do not wish to intimate any doubt that the law of the domicile at the time of the death is the governing law (see Story, *Conflict of Laws*, § 473), nor any that the statute 7 Will. IV. and 1 Vict. c. 26, applies only to wills of those persons who continue to have an English domicile, and are consequently regulated by the English law."

Section 9 of the Wills Act prescribes that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned." Notwithstanding this language, it is the practice of the Probate Division, on the principle just stated, to admit to probate or otherwise recognize as valid the wills of persons domiciled abroad, although not executed as prescribed by the act. The present case affords an instance of this being done. I fail to see why the provisions of section 10 of the Wills Act should apply to the will of Madame Forfillier any more than those of section 9.

There is, however, a series of cases referred to in the argument which seems to establish that a will purporting to be made in execution of a power is valid if it satisfies the requirements of the instrument creating the power, although it would be invalid according to the law of the domicile of the testator at the time of his death: see *In the Goods of Alexander*, 29 L. J. (P. M. & A.) 93; *In the Goods of Hallyburton*, L. R. 1 P. & M. 90; *In the Goods of Huber*, [1896] P. 209. These cases, however, do not lay down that a power to appoint by will (without special formalities) conferred on a person domiciled abroad cannot be executed by a will valid by the law of the domicile of the donee of the power at the time of his death, and consequently do not appear to me to affect the decision of the present case.

In the view which I take I am not concerned to deal with *In re Kirwan's Trusts*, which is distinguishable in its facts from the present case; but I may say that the decision in that case may be rested on these grounds. First, the power was required to be executed by an instrument in a special form which the instrument said to be an execution of the power did not satisfy. Secondly, the Wills Act had

no application, inasmuch as the testator was domiciled abroad; and although the instrument was not invalidated by the prohibitory portion of section 10, it did not derive validity from the enabling portion of that section. In any case the instrument did not satisfy the requirements of the Wills Act. Thirdly, although the instrument was valid by Lord Kingsdown's Act, still, as was pointed out by Kay, J., that statute does not contain any enactment dealing with wills made in exercise of powers. Although some of the language used by that learned judge may be susceptible of a different interpretation, I am not sure that he intended to decide anything inconsistent with the principle I have stated.

In my opinion, therefore, it was competent for Madame Forfillier to exercise the power conferred on her by Lady Price's will by such a will as has been recognized by the Probate Division. It remains to be considered whether she has done so. This question is one of construction.

In general a will is to be construed according to the law of the domicile of the testator: "but this is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country" (Dicey, Conflict of Laws, p. 695). Considering first the law of France, according to which *prima facie* the will is to be construed, the evidence shows that the will of Madame Forfillier is a complete disposition of all the property which she could dispose of; but it also appears that the mode of disposition by appointment is not practised in France, and that if a French court had to consider the effect of the will in this respect it would apply the English law. It is contended with regard to the law of England that the provisions of the Wills Act including section 27, are inapplicable, and that consequently the law of England applicable is the law as it existed before that act, and that, there being no reference in the will either to the power or to the property, it is not a good execution of the power. If I am to apply the law as it existed before the Wills Act, questions of difficulty might arise; but it appears to me that I can decide this case upon another ground. The testatrix says, "I declare that this will annuls all the others . . . and that it shall thus be considered in England the same as in France." I think that that amounts to a declaration by the testatrix that she meant the will to operate as her last will in England as well as in France. I think it is indicated upon the face of the will that she wrote it with reference to the law of England as well as the law of France. Therefore I think that I am entitled to apply the rules of construction which would by English law be applied to a will expressed in the same terms and of the same date as that annexed to the letters of administration, including the rule of construction introduced by section 27 of the Wills Act.

No question arises between Monsieur Forfillier and the daughter of his wife by her first marriage, who by the law of France might have a

claim if this fund had been part of Madame Forfillier's property ; for she appears and supports the claim of Monsieur Forfillier.

In my opinion, therefore, the husband, Monsieur Forfillier, is entitled to the fund.

SEWALL v. WILMER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[Reported 132 *Massachusetts*, 131.]

GRAY, C. J. Frederic Tuder of Boston, who died in 1864, by his will, which was duly admitted to probate in this Commonwealth, devised the residue of his estate, real and personal, in trust to the use of his children in equal shares till their arrival at the age of twenty-one years or marriage within that age ; and " as to, for, and concerning the share that shall hereunder be coming to " any daughter at her marriage or coming of age, " this to be held by said trustee in trust and to her use " till such marriage or coming of age, then in trust to convey " one half of her share," together with half of any accumulations of income, to her absolutely, discharged of all trusts ; and " as to and for the other half share of my said daughter, this to be held by said trustee to her sole and separate use, freed from the control or interference of her husband, during her natural life," yielding and paying the income to her quarterly on her sole and separate written order therefor, " and upon her death, then upon trust to convey, pay, and deliver, or hold the same, to the use of such persons, or for such uses, estates, and subject to such provisions, limitations, and agreements, as my said daughter shall, by any deed or writing to be by her signed, sealed, and delivered in presence of three or more credible witnesses, or by her last will and testament in writing, or by any writing purporting to be her last will and testament, to be by her duly executed in the presence of a like number of credible witnesses, give, direct, limit, and appoint, and, in default of such will or appointment, then upon trust to hold the same to the use of her children and their heirs respectively as tenants in common, and the legal representatives of any such child or children who may have deceased to be entitled to the same share as his or their parent would have been if then living ; and in case my said daughter shall die without issue, and without having made any testamentary disposition or appointment of the uses thereof," then to the testator's heirs at law.

His daughter Delia, in 1871, married Skipwith Wilmer of Baltimore, in the State of Maryland, and had four children by him, two of whom survived her, and she resided with her husband at Baltimore until her death in 1879. In 1872, a month before the birth of her oldest child, and having by the law of Maryland full testamentary capacity as if she

were unmarried, she signed and sealed in the presence of three witnesses a will, which was duly admitted to probate in Maryland, and also as a foreign will in this Commonwealth, the whole of which, except the formal parts and the appointment of her husband to be sole executor, was as follows: "I devise and bequeath all the real and personal estate to which I shall be entitled in law or equity at the time of my decease unto my husband Skipwith Wilmer aforesaid, his heirs and assigns, absolutely."

At the times of executing her will and of her death, the trustees, who had been appointed by decree of the Probate Court in this Commonwealth under the will of her father, and who resided here, held in trust for her property, real and personal, to the amount of \$80,000, all the real estate being situated in this Commonwealth; and she was the owner in her own right of personal property to the amount of \$20,000, and of real estate in this Commonwealth to the amount of \$40,000, and also of an equity, worth \$8,000, of redeeming other real estate in this Commonwealth from a mortgage made by her and her husband; parts of this equity of redemption and of her other real estate being subject to the dower of her father's widow.

The present suit is a bill by the trustees for the instructions of the court. Her husband and her two surviving children are made parties defendant, and have filed answers presenting the question whether the husband or the children are entitled to the property so held by the plaintiffs in trust for her.

It was suggested, though not strongly pressed, in behalf of the children, that, even if her will is expressed in apt terms to pass this property to her husband, yet the children are entitled to a share of it, under the Gen. Sts. c. 92, § 25, by which it is enacted that, "when a testator omits to provide in his will for any of his children, or for the issue of a deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate; unless they shall have been provided for by the testator in his lifetime, or unless it appears that such omission was intentional, and not occasioned by accident or mistake." But it is a sufficient answer to this suggestion, that the statute is evidently limited to estate of a testator, to which his children would have derived title from him, under the statutes of descents and distributions, if he had made no will; and has no application to estate which was not vested in him, in which he had no inheritable title, but a power of appointment only, and which, in case of his failure to execute the power, his children could not have claimed under him as his heirs or next of kin, but only as devisees or legatees under the will of the person who created the power. *Blagge v. Miles*, 1 Story, 426, 442.

The principal point in controversy between the husband and the children of Mrs. Wilmer is whether her will is a good execution of the power conferred on her by the will of her father; and the arguments upon this point have presented three questions: 1st. Whether this is

a good execution under the law of Maryland? 2d. Whether it is a good execution by the law of Massachusetts? 3d. Which law must govern the case?

The decisions of the Court of Appeals of Maryland, which are made part of the report on which the case has been reserved for our determination, clearly show that the law is settled in that State, in accordance with English cases decided since the American Revolution, that "the intention to execute a power of appointment by will must appear by a reference in the will to the power or to the subject of it, or from the fact that the will would be inoperative without the aid of the power; *Mory v. Michael*, 18 Md. 227, 241; *Michael v. Morey*, 26 Md. 239, 259; *Maryland Society v. Clendinen*, 44 Md. 429, 435; and that it is also settled, upon principles everywhere recognized, that the admission of a will to probate establishes only its validity as a testamentary instrument, and does not determine the extent of its operation. *Michael v. Baker*, 12 Md. 158; *Schley v. McCeney*, 36 Md. 266, 275. As the will of Mrs. Wilmer does not mention the power, nor the subject of it, and as she had other property of her own upon which her will could operate, it is clearly not a sufficient execution of the power under the law of Maryland.

But in this Commonwealth the decisions in England since our Revolution and before the St. of 7 Will. IV. & 1 Vict. c. 26, § 27, have not been followed; the court has leaned toward the adoption of the rule, enacted by that statute as to wills thereafter made in England, namely, that a general devise or bequest should be construed to include any real or personal estate of which the testator has a general power of appointment, unless a contrary intention should appear by his will; and it has been adjudged that the mere facts that the will relied on as an execution of the power does not refer to the power, nor designate the property subject to it, and that the donee of the power has other property of his own upon which his will may operate, are not conclusive against the validity of the execution of the power; but that the question is in every case a question of the intention of the donee of the power, taking into consideration not only the terms of his will, but the circumstances surrounding him at the time of its execution, such as the source of the power, the terms of the instrument creating it, and the extent of his present or past interest in the property subject to it; and a general devise of all the estate, real and personal, of which the testator should die seised or possessed, has accordingly been held to be a good execution of a power reserved to him in a trust settlement, made by him or by his direction, of property either his own or for which he had paid the consideration, and of which by the terms of the settlement he had the beneficial use during his life, as well as an absolute power of appointment after his death. *Amory v. Meredith*, 7 Allen, 397; *Willard v. Ware*, 10 Allen, 263; *Bangs v. Smith*, 98 Mass. 270. See also the very able opinions of Chief Justice Denio in *White v. Hicks*, 33 N. Y. 383, and of Mr. Justice Baker in *Frank v. Eggleston*, 92 Ill. 515.

In the present case, Mrs. Wilmer indeed had never owned the property in question, nor paid any consideration for it, nor had the power been created by herself. But the power was created by the will of her father, in which he speaks of the property to be conveyed to her on her coming of age or marriage, and of the property to be thereafter held in trust for her sole and separate use during her life, and conveyed to her appointees, or, failing any appointment, to her children, after her death, as together constituting "her share" of his estate. If she had been domiciled in this Commonwealth, and had here executed the will devising and bequeathing to her husband all the real and personal estate to which she should be entitled in law or equity at the time of her decease, it must, under the law of Massachusetts, as declared by the judgments of this court, have been held that she intended to make no distinction between the two halves of her share of her father's estate, of which the one had vested in her absolutely, and the other she had the exclusive beneficial use of for life and the general power to appoint after her death, and that the power was well executed.

We are then brought to the more interesting question, whether the construction and effect of the instrument, relied on as an execution of the power conferred on Mrs. Wilmer by her father's will, are to be governed by the law of Massachusetts or by the law of Maryland. This question is singularly free of direct authority.

As to the form of executing the power, it would seem that a will executed in the form authorized by the law of either State would be sufficient. On the one hand, it has been decided by the House of Lords, on appeal from Scotland, that a power of appointment reserved by a man residing out of Scotland, in a settlement by him of real estate in Scotland, was well executed by a will in the form required by the law of his domicile. *Willock v. Ouchterlony*, 3 Paton, 659; *Brack v. Johnston*, 5 Wils. & Sh. 61. And a like decision has been made by Lord Romilly, M. R., in a case of the execution in France of a power created by an English will. *D'Huart v. Harkness*, 34 Beav. 324. On the other hand, it is held in England that where a power of appointment by will is given by the will of a person domiciled in England, and is executed abroad by a will in a form required or permitted by the law of England, the will of the donee should be admitted to probate in England, although not executed with the forms required by the law of the donee's domicile. But it does not distinctly appear whether this is upon the broad ground that the power is well executed, or upon the narrower ground that the will should be formally established as a testamentary instrument in a court of probate, leaving it to a court of construction to determine whether it can have any effect. *Tatnall v. Hankey*, 2 Moore, P. C. 342; *Goods of Alexander*, 29 L. J. (N. S.) Prob. 93, 94; s. c. 1 Sw. & Tr. 454, note; *Barnes v. Vincent*, 5 Moore, P. C. 201, 217; *D'Huart v. Harkness*, 34 Beav. 328; *Goods of Hallyburton*, L. R. 1 P. & D. 90.

The case at bar does not present a question of form, but of construc-

tion; and upon principle the instrument executed by Mrs. Wilmer, being expressed in terms sufficient to constitute an effectual appointment by the law of Massachusetts, must be held a good execution of the power.

It is true that, as to personal property at least, the construction and effect of a will, and the distribution thereby made of the testator's estate, are to be governed by the law of his domicile. *Yates v. Thomson*, 3 Cl. & Fin. 544, 570, 585; s. c. 1 Sh. & McL. 795, 835; *Enohin v. Wylie*, 10 H. L. Cas. 1; *Harrison v. Nixon*, 9 Pet. 483; *Fellows v. Miner*, 119 Mass. 541, 544. But the property of which Mrs. Wilmer has a power of appointment is not her property, but the property of her father; and the instrument executed by her takes effect, not as a disposition of her own property, but as an appointment of property of her father under the power conferred upon her by his will. The domicile of the testator whose property is in question is therefore the domicile of the father. The property is held by trustees residing and appointed in Massachusetts, and must be distributed here, and the trustees cannot be compelled to account for it in Maryland or in any other State, even if they should be personally found there. *Campbell v. Wallace*, 10 Gray, 162; *Jenkins v. Lester*, 131 Mass. 355; *Leland v. Smith*, 131 Mass. 358, note. As the father did not require the power to be executed by will, but allowed it to be executed by any instrument purporting to be a will, or by any deed or writing signed and sealed in the presence of three witnesses, it is clear that he did not intend that it should be executed only by will effectual according to the law of his daughter's domicile; and she cannot be presumed to have intended that the instrument executed by her in the form of a will should have less effect than if it had no testamentary character.

As the property which Mrs. Wilmer has the power to dispose of is the property of a person domiciled here, is here held by trustees who can only be compelled to account for and distribute it here, and is part of her share of her father's estate, the other part of which, clearly included in her will, she has derived from the same source, and as no testamentary form is requisite to her execution of the power, she must be presumed to have intended that her will should have the effect, by way of appointment, attributed to it by the law of the only place in which it could be made operative as such, and by the court upon which the duty of expounding it devolves.

The decision in *Bingham's Appeal*, 64 Penn. St. 345, goes farther than is necessary for the decision of this case. William Bingham died in 1856, having his domicile in Pennsylvania, and by his will bequeathed personal property in trust to pay the income to his son for life, and upon his death to pay the principal to such persons as he should by will bequeath it to, or, in case of his dying intestate, to his issue, or, failing such issue, to other children of the testator. The son afterwards died domiciled in England, leaving a large estate of his own, and a will devising and bequeathing "all the rest and residue of my prop-

erty," in terms sufficient under the St. of 7 Will. IV. & 1 Vict. to execute the power, but insufficient for that purpose by the law of Pennsylvania. The Supreme Court of Pennsylvania held that the power was not well executed, because the property in question was William Bingham's, and not his son's, and therefore, applying the rule that the same interpretation of a will should be given in a foreign country which the will has in the place of domicil, "the will, the property, and the domicil of William Bingham being within Pennsylvania, the law of this State must govern the interpretation both of the power and the execution of it."

In the case at bar, the instrument executed by Mrs. Wilmer being sufficient under the law of Massachusetts, and therefore a good execution of the power, it is unnecessary to consider whether, if it had been sufficient by the law of Maryland and insufficient by the law of Massachusetts, it would have been an equally good execution. And all the real estate concerning which the plaintiffs ask for the instructions of the court being in Massachusetts, it becomes also unnecessary to consider how far, had it been situated elsewhere, the *lex domicilii* should yield to the *lex rei sitæ*. See *Bovey v. Smith*, 1 Vern. 60, 84, 144; *Trotter v. Trotter*, 4 Bligh N. R. 502; s. c. 3 Wils. & Sh. 407; 1 Jarman on Wills, 1; Story Conf., §§ 479 *a*, 479 *h*; Whart. Conf., § 597; Dicey on Domicil, 307; Westlake's Private International Law (ed. 1880), 181.

The result is, that in the opinion of a majority of the court the power of appointment has been well executed, and there must be a

*Decree for the husband.*¹

¹ Conversely, if a will would be regarded at the domicil of the testator as an execution of the power, but would not be so regarded at the domicil of the donor of the power, it is not a good exercise of the power. *Bingham's Appeal*, 64 Pa. 345; *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530. — ED.

CHAPTER IX.

OBLIGATIONS EX DELICTO.

PHILLIPS v. EYRE.

EXCHEQUER CHAMBER. 1870.

[*Reported Law Reports, 6 Queen's Bench, 1.*]

WILLES, J.¹ This is an action complaining of false imprisonment and other injuries to the plaintiff by the defendant in the island of Jamaica. The plea states in effect that the defendant was governor of the island; that a rebellion broke out there which the governor and others acting under his authority had arrested by force of arms; that an act was afterwards duly passed by the legislature of the island, and received the royal assent, by which, after reciting the rebellion, a proclamation of martial law within certain local limits by the governor with the advice of a council of war; that the rebellion had been suppressed and imminent general sacrifice of life thereby averted; that the military, naval, or civil authorities might, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion; and that all persons who in good faith and royal resolve had acted for the crushing of the rebellious outbreak ought to be indemnified and kept harmless for such their acts of loyalty, — it was enacted by the governor, legislative council, and assembly of the island, amongst other things, that the defendant and all officers and other persons who had acted under his authority, or had acted *bona fide* for the purpose and during the existence of martial law, whether done in any district in which martial law was proclaimed or not, were thereby indemnified in respect of all acts, matters, and things done in order to put an end to the rebellion, and all such acts were “thereby made and declared lawful, and were confirmed.” The plea further states that the grievances complained of in this action were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to, and *bona fide* done in order to put an end to, the rebellion, and so were included in the indemnity. To this plea the plaintiff demurred, and also replied that the defendant as governor was, by the

¹ Part of the opinion is omitted. — Ed.

law of Jamaica, a necessary party to the making of the act. The defendant demurred to that replication, and issues in law were raised upon the validity of the plea and replication, upon which issues the Court of Queen's Bench gave judgment for the defendant, whereupon the plaintiff has assigned error. . . .

The last objection to the plea of the colonial act was of a more technical character; that assuming the colonial act to be valid in Jamaica and a defence there, it could not have the extraterritorial effect of taking away the right of action in an English court. This objection is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. "*Quæ accessorium locum obtinent extinguuntur cum principales res peremptæ sunt.*" A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject-matter may show that the parties intended their bargain to be governed by some other law; but, *prima facie*, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong.

Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land: *Doulson v. Matthews*, 4 T. R. 503; and even with respect to those not falling within that description our courts do not undertake universal jurisdiction. As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character, that it would have been actionable if committed in England; therefore, in *The Halley*, Law Rep. 2 P. C. 193, the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done. Therefore,

in *Blad's Case*, 3 Swan. 603, and *Blad v. Bamfield*, 3 Swan. 604, Lord Nottingham held that a seizure in Iceland, authorized by the Danish Government and valid by the law of the place, could not be questioned by civil action in England, although the plaintiff, an Englishman, insisted that the seizure was in violation of a treaty between this country and Denmark—a matter proper for remonstrance, not litigation. And in *Dobree v. Napier*, 2 Bing. N. C. 781, Admiral Napier having, when in the service of the Queen of Portugal, captured in Portuguese water an English ship breaking blockade, was held by the Court of Common Pleas to be justified, by the law of Portugal and of nations, though his serving under a foreign prince was contrary to English law, and subjected him to penalties under the Foreign Enlistment Act. And in *Reg. v. Lesley*, Bell C. C. 220; 29 L. J. (M. C.) 97, an imprisonment in Chili on board a British ship lawful there, was held by Erle, C. J., and the Court for Crown Cases Reserved, to be no ground for an indictment here, there being no independent law of this country making the act wrongful or criminal. As to foreign laws affecting the liability of parties in respect of bygone transactions, the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own legislature. This distinction is well illustrated on the one hand by *Huber v. Steiner*, 2 Bing. N. C. 202, where the French law of five years' prescription was held by the Court of Common Pleas to be no answer in this country to an action upon a French promissory note, because that law dealt only with procedure, and the time and manner of suit (*tempus et modum actionis instituendæ*), and did not affect to destroy the obligation of the contract (*valorem contractus*); and on the other hand by *Potter v. Brown*, 5 East, 124, where the drawer of a bill at Baltimore upon England was held discharged from his liability for the non-acceptance of the bill here by a certificate in bankruptcy, under the law of the United States of America, the Court of Queen's Bench adopting the general rule laid down by Lord Mansfield in *Balantine v. Golding*, Cooke's Bankrupt Law, 487, and ever since recognized that "what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere." So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation, *ex delicto*, to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided. Cases may possibly arise in which distinct and independent rights or liabilities or defences are created by positive and specific laws of this country in respect of foreign transactions; but

there is no such law (unless it be the Governors Act already discussed and disposed of) applicable to the present case.

It may be proper to remark, before quitting this part of the subject, that the colonial act could not be overruled upon either of these two latter grounds of objection without laying down that no foreign legislation could avail to take away civil liability here in respect of acts done abroad; so that, for instance, if a foreign country after a rebellion or civil war were to pass a general act of oblivion and indemnity, burying in one grave all legal memory alike of the hostilities, and even the private retaliations which are the sure results of anarchy and violence, it would, if the argument for the plaintiff prevailed, be competent for a municipal court of any other country to condemn and disregard, as naturally unjust or technically ineffectual, the law of a sovereign State, disposing, upon the same constitutional principles as have actuated our own legislature, of matters arising within its territory — a course which to adopt would be an unprecedented and mischievous violation of the comity of nations.

We have thus discussed the validity of the defence upon the only question argued by counsel, touching the effect of the colonial act, but we are not to be understood as thereby intimating any opinion that the plea might not be sustained upon more general grounds as showing that the acts complained of were incident to the enforcement of martial law. It is, however, unnecessary to discuss this further question, because we are of opinion with the court below that the colonial Act of Indemnity, even upon the assumption that the acts complained of were originally actionable, furnishes an answer to the action.

The judgment of the Court of Queen's Bench for the defendant was right, and is affirmed.

Judgment affirmed.

MACHADO v. FONTES.

COURT OF APPEAL. 1897.

[Reported [1897] 2 Queen's Bench, 231.]

APPEAL from KENNEDY, J., at chambers.

The plaintiff brought this action to recover damages from the defendant for an alleged libel upon the plaintiff contained in a pamphlet in the Portuguese language alleged to have been published by the defendant in Brazil.

The defendant delivered a statement of defence (in which, amongst other defences, he denied the alleged libel), and he afterwards took out a summons for leave to amend his defence by adding the following plea: "Further the defendant will contend that if (contrary to the defendant's contention) the said pamphlet has been published in Brazil, by the Brazilian law the publication of the said pamphlet in Brazil

cannot be the ground of legal proceedings against the defendant in Brazil in which damages can be recovered, or (alternatively) cannot be the ground of legal proceedings against the defendant in Brazil in which the plaintiff can recover general damages for any injury to his credit, character, or feelings."

The summons came before KENNEDY, J., in chambers, who allowed the plea to be added, but expressed some doubt as to the propriety of so doing, and gave leave to plaintiff to bring the present appeal.¹

LOPES, L. J. I am of opinion that this appeal ought to be allowed. [The Lord Justice then referred to the facts, and, after reading the plea, continued:]

Now that plea, as it stands, appears to me merely to go to the remedy. It says, in effect, that in this case no action in which damages could be recovered would lie in Brazil, and, assuming that any damages could be recovered in Brazil, they would be special damages only. Mr. Walton contends that that is not the meaning of the plea; that the plea is intended to raise a larger question than that, and to say that libel cannot be made the subject of any civil proceedings at all in Brazil, but is only the subject-matter of criminal proceedings; and, for the purposes of what I am about to say, I will assume that to be so.

Now the principle applicable in the present case appears to me to be this: where the words have been published outside the jurisdiction, then, in order to maintain an action here on the ground of a tort committed outside the jurisdiction, the act complained of must be wrongful — I use the word "wrongful" deliberately — both by the law of this country and also by the law of the country where it was committed; and the first thing we have to consider is whether those conditions are complied with.

In the case of *Phillips v. Eyre*, L. R. 6 Q. B. 1, Willes, J., lays down very distinctly what the requisites are in order to found such an action. He says this (at p. 28): "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done." Then in *The M. Moxham*, 1 P. D. 107, James, L. J., in the course of his judgment, uses these words (at p. 111): "It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the Legislature, then this court will take into consideration that state of the law, — that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here."

Both those cases seem to me to go this length: that, in order to constitute a good defence to an action brought in this country in re-

¹ Arguments of counsel are omitted. — Ed.

spect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed. In the present case there can be no doubt that the action lies, for it complies with both of the requirements which are laid down by Willes, J. The act was committed abroad, and was actionable here, and not justifiable by the law of the place where it was committed. Both those conditions are complied with; and, therefore, the publication in Brazil is actionable here.

It then follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue.

Therefore, in this case, in my opinion, damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country.

It is contended that it would be much better that this question should not be decided at the present time, but that a commission should go to Brazil, and that the Brazilian law should be inquired into. If our view is correct, it seems to me that that would be a great waste of time and money, because, having regard to the authorities I have mentioned, this plea is absolutely bad, and ought to be struck out.

RIGBY, L. J. I am of the same opinion. I do not propose to decide this case on any technical consideration as to what may be the precise meaning of the allegation that is proposed to be introduced into the defence; I give it the widest possible construction it can reasonably bear; and I will assume it to involve that no action for damages, or even no civil action at all, can be maintained in Brazil in respect of a libel published there. But it does not follow from that that the libel is not actionable in this country under the present conditions, and having regard to the fact that the plaintiff and defendant are here.

Willes, J., in *Phillips v. Eyre*, was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned judge prepared the propositions that he was about to enunciate, I cannot doubt that the change from "actionable" in the first branch of the rule to "justifiable" in the second branch of it was deliberate. The first requisite is that the wrong must be of such a character that it would be actionable in England. It was long ago settled that an action will lie by a plaintiff here against a defendant here, upon a transaction in a place outside this country. But though such action may be brought here, it does not follow that it will succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shown by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocency of the act in the foreign country is an answer to the action. That is what

is meant when it is said that the act must be "justifiable" by the law of the place where it was done.

It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be.

The remedy must be according to the law of the country which entertains the action. Of course, the plea means that no action can be brought in this country in respect of the libel (if any) in Brazil. But I think the rule is clear. It was very carefully laid down by Willes, J., in *Phillips v. Eyre*; and in the case of *The M. Moxham*, all the learned judges of the Court of Appeal in their judgments laid down the law without hesitation and in a uniform manner: and first one judge and then another gave, in different language but exactly to the same purport and effect, the rule enunciated by Willes, J. So that if authority were wanting there is a decision clearly binding upon us, although I think the principle is sufficient to decide the case.

I think there is no doubt at all that an action for a libel published abroad is maintainable here, unless it can be shown to be justified or excused in the country where it was published. James, L. J., states, in *The M. Moxham*, what the settled law is. Mellish, L. J., is quite as clear upon that point as James, L. J., in laying down the general rule; and Baggallay, L. J., also takes the same view. We start, then, from this: that the act in question is *prima facie* actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give. Here we cannot see it, and this appeal must be allowed with costs.

*Appeal allowed.*¹

¹ In *Scott v. Seymour*, 1 H. & C. 219, 234, in the Exchequer Chamber, WIGHTMAN, J., said *obiter*: "I am not aware of any rule of law which would disable a British subject from maintaining an action in this country for damages against another British subject for an assault and battery committed by him in a foreign country, merely because no damages for such trespasses were recoverable by the law of the foreign country, and without any allegation that such trespasses were lawful or justifiable in that country. By the law of England, an action to recover damages for an assault and battery is transitory, and whatever might be the case as between two Neapolitan subjects, or between a Neapolitan and an Englishman, I find no authority for holding that, even if the Neapolitan law gives no remedy for an assault and battery, however violent and unprovoked, by recovery of damages, that therefore a British subject is deprived of his right to damages given by the English law against another British subject." BLACKBURN, J., said: "If, indeed, the plea had averred that by the law of Naples no damages are recoverable for an assault however violent, that would have raised a question upon which I have not at present made up my mind. I doubt whether it would be a good bar, but, supposing it would, I am disposed to think that the fact of the parties being British subjects would make no difference. As at present advised, I think that when two British subjects go into a foreign country, they owe local allegiance to the law of that country, and are as much governed by that law as foreigners." WILLIAMS, J., said, as to the dictum of WIGHTMAN, "as at present advised, I am not prepared to assent to it." The other judges declined to express an opinion on the point. — ED.

LE FOREST v. TOLMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1875.

[Reported, 117 *Massachusetts*, 109.]

GRAY, C. J. In order to maintain an action of tort, founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought. *Smith v. Condry*, 1 How. 28; s. c. 17 Pet. 20; *The China*, 7 Wall. 53, 64; *Blad's Case*, 3 Swanst. 603; *Blad v. Bamfield*, 3 Swanst. 604; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239, and L. R. 6 Q. B. 1; *The Halley*, L. R. 2 Adm. 3, and L. R. 2 P. C. 193; *Stout v. Wood*, 1 Blackf. 71; *Wall v. Hoskins*, 5 Ired. 177; *Mahler v. Norwich & New York Transportation Co.*, 35 N. Y. 352; *Needham v. Grand Trunk Railway*, 38 Vt. 294; *Richardson v. New York Central Railroad*, 98 Mass. 85.

In the case at bar, the injury sued for was done to the plaintiff in New Hampshire by a dog owned and kept by the defendant in Massachusetts. Such an action could not be maintained at common law, without proof that the defendant knew that his dog was accustomed to attack and bite mankind. *Popplewell v. Pierce*, 10 Cush. 509; *Pressed v. Wirth*, 3 Allen, 191. No evidence of such knowledge, or of the law of New Hampshire, was introduced at the trial. Nor is it contended that the defendant would be liable to any action or indictment by the laws of that State.

The plaintiff relies upon the statute of this Commonwealth, which provides that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort." Gen. Sts. c. 88, § 59. This statute is not a penal, but a remedial statute, giving all the damages to the person injured. *Mitchell v. Clapp*, 12 Cush. 278. It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures another person, the owner or keeper shall be liable, without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists not in the act of the master in owning or keeping, or neglecting to restrain, the dog, but in the act of the dog for which the master is responsible.

The defendant having done no wrongful act in this Commonwealth, and the injury for which the plaintiff seeks to recover damages having taken place in New Hampshire, and not being the subject of action or indictment by the laws of that State, this action cannot be maintained.

*Exceptions sustained.*¹

¹ Acc. *The Lamington*, 87 Fed. 752; *Carter v. Goode*, 50 Ark. 155, 6 S. W. 719; *Whitford v. Panama R. R.*, 23 N. Y. 465; *Holland v. Pack, Peck*, 151; *McLeod v. R. R.*, 58 Vt. 727; 16 *Clunet*, 664 (French Cass. 16 May, '88). — Ed.

DAVIS v. NEW YORK AND NEW ENGLAND RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1887.

[Reported 143 Massachusetts, 301.]

DEVENS, J. The defendant is a railroad corporation, operating a railroad through Massachusetts and Connecticut, as a continuous line, by virtue of the St. of 1873, c. 289, and exists as a corporation by the laws of each of these States. This action is brought by the plaintiff, as administrator of the estate of Mrs. Ruth L. Brown, for alleged injury to her, which finally resulted in her death, by reason of the carelessness of the defendant and that of its servants, while she was being conveyed as a passenger over its railroad in Connecticut, the intestate being herself at the time in the exercise of due care.

The law of the State of Connecticut has been properly determined as a fact by the judge presiding at the trial, and his finding in regard to it is conclusive. *Ames v. McCamber*, 124 Mass. 85, 91. From this it appears "that, by the common law in Connecticut, an action for personal injuries does not survive to the administrator of the person injured; that there is no statute or law in Connecticut by virtue of which a common-law action for personal injuries is revived, or made to survive to an administrator of the person injured." The facts, as they are alleged, "do not constitute a cause of action under the laws of the State of Connecticut by the administrator in behalf of the intestate's estate, and this action could not be maintained in that State, if duly brought by an administrator there." The administrator may there maintain, upon these facts, a special action, penal in its nature, created by the statutes of Connecticut, by which the damages recoverable are limited to not more than \$5,000, and under which the damages recovered do not become assets of the estate, but are recovered in behalf of certain persons not thus entitled to the same according to the laws of distribution, and are to be paid over in specified proportions to them.

The plaintiff does not contend that he may maintain this action as the special one provided by the statute of Connecticut, nor under the laws of that State. *Richardson v. New York Central Railroad*, 98 Mass. 85. We are aware that the correctness of this decision has been called in question by the Supreme Court of the United States in *Dennick v. Railroad*, 103 U. S. 11; but it is unnecessary to reconsider our own decision, as the plaintiff seeks only to maintain his action under our statute, which provides that, in case of damage to the person, the action shall survive, and may thus be prosecuted by an administrator. Pub. Sts. c. 165, § 1; *Hollenbeck v. Berkshire Railroad*, 9 Cush. 478. The inquiry is therefore presented, whether a cause of action at common law, which dies with the person in the State where it accrued, not having been made there to survive by any statute, will survive under and by

virtue of the statutes of survivorship of another State, so that, if jurisdiction is there obtained over the person or property of the defendant, judgment may properly be rendered against him or his property. That our statute would furnish a remedy, where the cause of action was one recognized by the law of this State as the foundation of an action at common law, although it accrued without the State, it being there recognized as existing, and not discharged or extinguished, will be conceded.

It must certainly be the right of each State to determine by its laws under what circumstances an injury to the person will afford a cause of action. If this is not so, a person who is not a citizen of the State, or who resorts to another State for his remedy, if jurisdiction can be obtained, may subject the defendant in an action of tort to entirely different rules and liabilities from those which would control the controversy were it carried on where the injury occurred; and, as by the law of Massachusetts it is required that a person injured while travelling upon a railroad must prove, not only the negligence of the defendant, but also that he himself was in the exercise of due care, and as jurisdiction may be obtained by an attachment of property of the defendant in another State, the plaintiff might relieve himself of the necessity of proving his own due care, if, by the law of the State to which he may resort, such proof is not required, and thus put upon the railroad company a higher responsibility than is imposed by the State in which it was performing its business. In a similar way, if a traveller upon a steam or horse railroad could not recover in this State for an injury done by carelessness in transporting him, because he was travelling upon Sunday, in violation of the laws of the State, he might, unless the law prescribed in this State is to govern, recover in any State where laws forbidding travelling on Sunday did not exist, if jurisdiction could there be obtained over the defendant or its property. Where an injury occurs in another State, which would be the foundation of an action at common law, and it is known that the general law of that State is the common law, it may be inferred that the transaction is governed by its rules as here applied, in the absence of evidence to the contrary; but, when it is shown to be otherwise, the law of the State where the injury occurs is to be regarded. It is a general principle, that, in order to maintain an action of tort founded upon an injury to person and property, the act which is the cause of the injury and the foundation of the action must at least be actionable by the law of the place where it is done, if not also by that of the place in which redress is sought. *Le Forest v. Tolman*, 117 Mass. 109, and cases cited. It must be for the State of Connecticut to prescribe when, and under what circumstances, a cause of action shall arise against a corporation which operates a railway within its limits, by reason of an act done by it. It may provide that, for an injury done by its carelessness, there shall be no cause of action on behalf of the injured party, but punishment by indictment only, or it may give to such injured person a cause of action, and for the same injury make the corporation

responsible, by indictment or other proceeding, for a fine or damages which shall go to the State, to relatives of the injured party, or to any other persons named. *Commonwealth v. Metropolitan Railroad*, 107 Mass. 236.

The intestate did, by the common law of Connecticut, have a right of action during her lifetime, but for this has been substituted in that State, she having deceased, the penal action created by the statute.

It is the contention of the plaintiff, that the cause of action may be held to survive by virtue of our statute, notwithstanding no cause of action now exists in Connecticut. Pub. Sts. c. 165, § 1. That the special action in Connecticut can now be maintained is not controverted. If, therefore, this contention of the plaintiff is correct, the defendant continues liable for its act or neglect in Connecticut by the law of Massachusetts, while it is also liable by reason of the penalty imposed upon it by the law of Connecticut as a substitute for its original liability, such penalty being still capable of enforcement. The design of our statutes of survivorship is primarily to provide for survival of those actions of tort the causes of which occur in this State. If similar statutes existed in another State, where the original cause of action accrued, it would not be difficult to hold that our own applied to such causes, upon the same principle by which we hold that the intestate herself might originally have brought her action here. When no such cause of action now exists in the State where the injury occurred, it is not easy to see how it can exist here, especially when, in such State, another cause of action, growing out of the same facts, has been substituted for it. This would be to subject the defendant to two liabilities, one existing by the law of the State in which jurisdiction over person or property was obtained, but in which the accident did not occur; and the other imposed by the law of the State where it did occur, and where the defendant had its residence; while in either State the liability there imposed would be the only one to which the defendant could by its law be subjected.

It may be suggested, that the law of Connecticut, in failing to provide that an action for a personal injury shall survive to the administrator, has, negatively, only the same effect as a statute of limitations, which operates merely to take away the remedy of a plaintiff, while his cause of action still exists.

By the ancient common law, as it existed before the St. of 4 Edw. III. c. 7, which was adopted and practised on in this State before the Constitution, 6 Dane Abr. 607, no action *ex delicto* survived to the personal representative, the maxim *Actio personalis moritur cum persona* being of universal application. *Wilbur v. Gilmore*, 21 Pick. 250. Subsequently to that statute, which was liberally construed, an action for a tort, by which the personal property of one was injured or destroyed, survived to his administrator, such tort being an injury to the property which otherwise would have descended to him. But the theory that a personal injury to an individual was limited to him only,

that no one else suffered thereby, and that therefore by his decease the cause of action itself ceased to exist, continued.

While the action for personal injury is spoken of as surviving, as there previously was no responsibility to the estate, the statute creates a new cause of action. It imposes a new liability, and does not merely remove a bar to a remedy such as is interposed by the statute of limitations, which, if withdrawn by the repeal of the statute, would allow an action to be maintained for the original cause. What the new liability shall be, by what conditions it shall be controlled, and whether the original liability shall be destroyed, must be determined by the law of the State where the injury occurs, unless the legislation of other States is to have extraterritorial force, and govern transactions beyond their limits. We perceive no intention to invest it with such force, even if it were possible so to do.

By the decease of the intestate, the cause of action at common law which she once had in Connecticut has there ceased to exist. It is for that State to determine what provision, by action or indictment, if any, shall be made in order to indemnify the estate of the intestate, or her relatives, or to punish the party causing the injury to her. Our statute, permitting the survival of similar actions in this State, does not therefore apply.

The question considered in the case at bar was fully and ably discussed in *Needham v. Grand Trunk Railway*, 38 Vt. 294, and the same result reached as that at which we have arrived. To the same effect also is *State v. Pittsburgh & Connellsville Railroad*, 45 Md. 41.

The plaintiff, in his argument, attaches importance to the St. of 1873, c. 289, by virtue of which the defendant's railroad is operated in the several States through which it runs as a continuous line; but the fact that it is a corporation by the law of Massachusetts as well as by that of Connecticut cannot make its liabilities different or greater in this State on account of transactions occurring entirely in Connecticut; nor are the rights of the plaintiff greater because his intestate, who was injured in this transaction, was a citizen of this Commonwealth. *Whitford v. Panama Railroad*, 23 N. Y. 465, 472; *Richardson v. New York Central Railroad*, *ubi supra*.

The ruling that the action could be maintained was therefore erroneous. *Exceptions sustained.*¹

¹ *Acc. Davidow v. Pennsylvania R. R.*, 85 Fed. 943; *De Ham v. Mex. Nat. Ry.*, 86 Tex. 68, 23 S. W. 381; *Needham v. R. R.*, 38 Vt. 294. — ED.

HIGGINS v. CENTRAL NEW ENGLAND AND WESTERN RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1892.

[Reported 155 Massachusetts, 176.]

BARKER, J. The plaintiff's intestate was domiciled in Massachusetts, where the plaintiff was appointed administrator. This being the principal administration, the plaintiff succeeded as well to every right of action of the deceased which survived as to his other personal property. Upon the question whether such an administrator takes a right of action by succession from his intestate, it is immaterial that the right arose under the statute of a foreign State, rather than under the common law or the statutes of this State; just as the fact that the intestate's chattels or merchandise had been acquired or were held under the statutes of a foreign State, rather than under the law of his domicile, is immaterial upon the question whether such merchandise or chattels pass to the administrator.

Such an administrator is entitled to the aid of our courts, if they have jurisdiction of the necessary parties, in collecting and reducing into money the property which he takes by succession, whether goods, chattels, or choses in action.

Suits brought to enforce rights of action which the deceased had, and which survived and passed from him to his administrator, differ essentially from those which this court refused to entertain in *Richardson v. New York Central Railroad*, 98 Mass. 85; and in *Davis v. New York & New England Railroad*, 143 Mass. 301. In *Richardson's* case an administrator appointed here sought to enforce in our courts a cause of action which his intestate never had, which had not passed to the administrator by succession, and which the statutes of another State had caused to spring up at the death of the intestate, and had provided might be brought by and in the names of his personal representatives, for the exclusive benefit of his widow and next of kin. In *Davis's* case the intestate had a right of action in his lifetime by the common law of the State of Connecticut, where he was injured; but by the law of Connecticut his right of action did not survive, and was extinguished at his death, while a penal action created by statute was substituted for it in that State.

In the present case the plaintiff's intestate is alleged to have been instantly killed in Connecticut, by the defendant's negligence. It is conceded that the statute of that State makes the defendant liable to pay damages for the injury which caused his death. Can his administrator sue here to recover such damages? The Connecticut statute places in one category "all actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death," and all actions "to the reputation, or to the property, and actions to

recover damages for injury to the person of the wife, child, or servant of any person," and provides that all shall survive to the executor or administrator. Gen. Sts. of Conn. of 1888, § 1008. One evident purpose of this statute was to give to actions for injuries resulting in instantaneous death the same incidents as actions which survive have. It is grouped with actions which survive for other injuries to the person, and for injuries to reputation and to property, and all are said to survive. The putting in operation of the negligent or unlawful forces which cause an instantaneous death is a wrong to the person killed, which, by more or less of appreciable time, precedes his death. If the law of the country where such a wrong is committed gives to the person killed a right of action, and provides that it shall survive to his administrator, there is no difficulty in considering that the deceased had that right of action at the instant when he was *vivus et mortuus*, and that by express provisions of law it is made to survive and to pass to his administrator. This the statute referred to has plainly attempted to do. As was held in *Davis v. New York & New England Railroad*, *ubi supra*, it is the right of each State "to determine by its laws under what circumstances an injury to the person will afford a cause of action." Viewing this statute of Connecticut as a whole, it plainly puts such causes of action as the present upon the footing of personal actions which survive, and which are everywhere considered transitory; that is, they go with the person who has the right of action where he goes, and are enforceable in any forum according to its rules of procedure. If they survive, such actions, like other personal estate, are considered to have situs in the place of domicile, and to pass to the administrator there appointed. Viewing the causes of action with which the Connecticut statute deals in connection with the one now sued on, our own statutes of survivorship are similar. There is, therefore, nothing in the nature of the cause of action as so far developed to prevent our courts from entertaining it upon principles generally recognized.

Assuming that the cause of action is one not existing at the common law, but created by the statute of another State, we have seen that it is transitory, and that it survives and passes from the deceased to his administrator. When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other States shall be heard here. These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State

or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction. *Blanchard v. Russell*, 13 Mass. 1, 6; *Prentiss v. Savage*, 13 Mass. 20, 24; *Ingraham v. Geyer*, 13 Mass. 146; *Tappan v. Poor*, 15 Mass. 419; *Zipcey v. Thompson*, 1 Gray, 243, 245; *Erickson v. Nesmith*, 15 Gray, 221, and 4 Allen, 233, 236; *Halsey v. McLean*, 12 Allen, 438, 443; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 353; *Bank of North America v. Rindge*, 154 Mass. 203.

Applying these rules, we find no sufficient reason for declining to entertain the present action. Our own statutes have, in several instances, changed the policy of the common law, so as to allow damages for death occasioned by negligence. Pub. Sts. c. 52, § 17; c. 73, § 6; c. 112, § 212; St. 1883, c. 243; St. 1887, c. 270, § 2. The right created by the Connecticut statute is in terms a right to recover "just damages." Gen. Sts. of Conn. of 1888, § 1009. Neither the fact that the statute creating it limits the amount of the recovery to a sum not exceeding five thousand dollars, nor that the damages are to be distributed to the husband, widow, heirs, or next of kin, makes it a penal action. The effect of such provisions as to the distribution of the damages is to say that they shall not be assets for the payment of debts, and shall not pass by the will of the deceased, but shall be applied to the compensation of the persons who are presumed to have suffered the most by the death of the person injured. Such a right is not unjust, nor contrary to good morals, nor calculated to injure the State or its citizens. Our courts have jurisdiction of the necessary parties. Looking at the statute creating the right of action as a part of the system of law in force in Connecticut, and considering that, if the action is to be prosecuted here, our rules of law regulating procedure, and fixing the elements which are to enter into the assessment of the damages, must govern the trial, it is probable that the result will not be exactly the same as if the remedy had been pursued in Connecticut. But we see no such difficulty as to lead us to suppose that injustice may be done to the defendant, and none which ought to make us decline jurisdiction, if the plaintiff elects to sue here.

The statutes which create and limit the right of action are found in the provisions regulating civil actions in the courts of Connecticut, and are part of its general system of law. By "the costs and expenses of suit," which, under § 1009, are to be deducted from the damages before they are distributed, were intended costs of suit allowed under Connecticut laws, and the expenses of the suit exclusive of such costs, these expenses, including those of trials not resulting in a verdict, are a constituent element of the "just damages" under the Connecticut system. The same system allows exemplary and vindictive damages. *Noyes v. Ward*, 19 Conn. 250; *Beecher v. Derby Bridge & Ferry Co.* 24 Conn. 491, 497; *Murphy v. New York & New Haven Railroad*, 29

Conn. 496, 499. If, in the action prosecuted here, neither the expenses of the suit nor exemplary nor vindictive damages can be recovered, that fact is no hardship upon the defendant. There is no reason why the plaintiff may not be allowed to waive those elements of damage, by bringing his action in a forum where they cannot be allowed. It is also a part of the Connecticut system, that, upon the default of a defendant in such actions, the plaintiff has no right to have his damages assessed by a jury, and in practice the assessment is uniformly made by the court alone. Gen. Sts. of Conn. of 1888, § 1106; *Raymond v. Danbury & Norwalk Railroad*, 43 Conn. 596, 598. Upon such assessment in Connecticut, the defendant, to reduce the damages to a nominal sum, may show contributory negligence, or any matter which, if pleaded and proved in bar, would have defeated the action. *Daily v. New York & New Haven Railroad*, 32 Conn. 356; *Carey v. Day*, 36 Conn. 152. But even if it appeared that the motive for bringing an action here was to insure an assessment of the damages by a jury, we cannot perceive in that a valid reason for declining to take jurisdiction.

It is to be noticed that, while the statute upon which the plaintiff founds his claim makes the cause of action one which accrued to the plaintiff's intestate in his lifetime, and provides that it shall survive and pass to his administrator, it does not say in terms that the damages shall or shall not be assets of the intestate estate, but provides that they shall be distributed in a way which may or may not be different from the disposition to be made under our law of the assets of the deceased to be administered. As this intestate was domiciled in Massachusetts, we are not to be taken as now deciding how any damages which the plaintiff may recover are to be here administered.

*Demurrer overruled.*¹

WHITTEN v. BENNETT.

CIRCUIT COURT OF THE UNITED STATES, DIST. CONNECTICUT. 1896.

[Reported 77 *Federal Reporter*, 271.]

TOWNSEND, District Judge. This is an action by George E. Whitten, of Newton, Mass., against William L. Bennett, of New Haven, Conn., executor of the will of Tilton F. Doolittle, deceased, late of said New Haven, and John R. Leete, of said New Haven. The complaint alleges that said Doolittle, while State's attorney for New Haven County, Conn., drew an indictment charging plaintiff, together with J. Edward Lee, with murder in the second degree, and, knowing that he had no evidence to support said indictment, handed it to the grand jury, and told them that, if they found probable cause against Lee, they should mark

¹ *Contra*, Texas & P. Ry. v. Richards, 68 Tex. 375, 4 S. W. 627. — Ed.

the indictment, "A true bill," and that, as plaintiff was not in the State, they were to pay no attention to it as connected with him; that the grand jury were satisfied that there was no case against the plaintiff, but, by mistake and clerical error, indorsed said indictment, "A true bill"; that although Doolittle knew that the grand jury did not indict the plaintiff, and that the indorsement was caused by said Doolittle's statements to them, he obtained a requisition, and sent the other defendant, Leete, to bring the plaintiff from Massachusetts; that Leete was instructed by Doolittle to bring the plaintiff with all speed and haste from Massachusetts, so that the plaintiff could not have the benefit of the writ of habeas corpus; that plaintiff was arrested by a warrant from the governor of Massachusetts, and taken to the police station at Newton; that the defendant Leete falsely and fraudulently represented to the marshal and keeper of the Newton police station that the plaintiff was charged with murder in the first degree, — an offence not bailable, — and that thereby the plaintiff was not admitted to bail in Massachusetts, as otherwise would have been the case, and was prevented from suing out a writ of habeas corpus; that plaintiff was a surgeon in good practice and of good reputation; that he was subject to imprisonment and great indignity; suffered great pain of mind; lost a large part of his income; expended enormous sums of money in obtaining his release; and has been injured in his good name and practice. The damages claimed are \$100,000.

To this complaint, the defendant Bennett demurs, upon the following grounds: (1) The cause of action does not survive against the executor. (2) The decedent, Doolittle, was not responsible, in a private action, for acts done by him as State's attorney within the line of his powers and duties. (3) It is not alleged that the prosecution was instituted without probable cause. (4) It is not alleged that the prosecution has been terminated by the acquittal or discharge of the plaintiff. (5) The complaint does not state a cause of action. Defendant Leete demurs, on the ground that the process was valid on its face, and that he was protected thereby, and that the complaint does not allege that the prosecution is terminated.

Plaintiff claims, as to the defendant Bennett, that the process was founded upon an indictment not actually made by the grand jury, and was therefore wholly void, and in no way protected any one acting under it. The statutes of Massachusetts provide that certain injuries, which do not survive by the common law or by the statutes of the State of Connecticut, shall survive against the executor. Thus, an action for false imprisonment survives against the executor in Massachusetts. Plaintiff claims that, by means of said acts of the deceased, he was actually imprisoned in Massachusetts; that he has a good cause of action for injuries done in Massachusetts; and that as these would, by the laws of Massachusetts, survive against the executor, they must be held to so survive here. I do not understand that the Massachusetts statute limits the survival of such actions to those in

which the causes of action arose in the State of Massachusetts. If, therefore, one should falsely imprison another in an adjoining State, and then remove to Massachusetts, and die, it would seem that the cause of action would survive against the executor there; or if the deceased had been domiciled in Massachusetts when he died, and his estate was in process of settlement there, I think an action of false imprisonment would lie against the executor, even though the imprisonment was done in Connecticut. But this is a common-law action for a personal wrong, alleged to have been committed by defendant's testator, who was domiciled in Connecticut at the time of his decease. The law of the jurisdiction within which the decedent was thus domiciled determines the nature and extent of the remedy for such wrongs. At the time of the alleged commission of said wrongs, there was no statute in Connecticut providing for the survival of actions therefor. "All private as well as public wrongs and crimes are buried with the offender. The executor does not represent or stand in the place of the testator as to them, or as to any acts of malfeasance or misfeasance to the person or property of another, unless some valuable fruits of such acts have been carried into the estate." *Mitchell v. Hotchkiss*, 48 Conn. 9, 16; *Payne's Appeal*, 65 Conn. 297, 408, 32 Atl. 948, 952; *Hegerich v. Keddie*, 99 N. Y. 258, 1 N. E. 787.

This conclusion renders it unnecessary to consider the other questions involved, so far as they affect the executor.

The defendant John R. Leete served the process. I cannot assent to plaintiff's claim that it was so far void as not to protect the person serving it. It is not disputed that the record in the Connecticut superior court shows a proper indictment, and that the papers are regular. The officer serving the process ought not to be obliged to inquire whether the grand jury made a mistake in doing what they did. The process was valid on its face, and protected him.

Both demurrers are sustained.

ALEXANDER v. PENNSYLVANIA COMPANY.

SUPREME COURT OF OHIO. 1891.

[*Reported 48 Ohio State, 623.*]

BRADBURY, J.¹ The record discloses that the plaintiff in error, a boy of about sixteen years of age, was in the service of the defendant as one of a gang of employees engaged in relaying the track of a branch of defendant's railroad; that his work, mainly, consisted in carrying water for the other members of the gang; occasionally, however, he

¹ Part of the opinion only is given. — ED.

assisted in the work they were doing ; that on the day he was injured a train of cars loaded with cinders, for ballasting the track, was waiting to be unloaded, and that as he was climbing on one of the cars, or perhaps had gotten on it, to help unload the cinders, the train was started forward, by reason of which he was thrown from the car, under its wheels, receiving, besides other lesser injuries, one necessitating the amputation of a leg between the ankle and knee. The foreman of the gang discharged and employed men, had immediate control of them while at work, and of the work being done. Undoubtedly, according to the law of this State, he was such a representative of the company as would render it liable to one of the gang of men under his control, who should be injured by his negligence. At this point there is a conflict in the testimony respecting the conduct of the plaintiff in error and the foreman, and the immediate circumstances under which the plaintiff went upon the car and the train put in motion ; but there is evidence from which the jury could find that the foreman ordered the plaintiff to assist in unloading the cinders ; that in obedience to this order he attempted to climb upon a car ; that he did so in a reasonably careful manner, and that the foreman carelessly, even recklessly, ordered the train to be moved forward before the plaintiff had secured himself a safe footing upon the car he was attempting to board, thereby throwing him from it and under its wheels, causing the injury of which he complains ; thus giving to the plaintiff, according to the law of Ohio, a right of action against the railroad company.

The real questions in contention between the parties in this court arise out of the fact that the accident occurred in the State of Pennsylvania. . . .

The record discloses that the contract by which the plaintiff in error was employed, was made in the State of Pennsylvania ; that his services were to be rendered wholly within that State, and that he was injured therein.

If the right of a servant to recover damages from his master on account of an injury received through the negligence of a superior servant of the same master arises out of contract, then the case of Knowlton v. Erie Railway Co., 19 Ohio St. 260, is decisive of the case at bar. The syllabus of that case reads : " The defendant is a common carrier of passengers, incorporated by the laws of New York, and was sued as such common carrier on account of injuries received by the plaintiff whilst being carried as a passenger from one point to another on defendant's road, and wholly within said State. The injury was charged to have been occasioned by defendant's negligence. The pleadings show that the plaintiff was being carried gratuitously at the time of the accident, under a contract by which the plaintiff assumed all risks of accident and injury arising from negligence, etc., and that such contract is valid by the laws of New York. *Held*: That the validity of the stipulation exempting the defendant from liability for negligence must be determined by the laws of New York, within whose jurisdiction the

contract was made and to be executed ; and as the plaintiff, under his contract, could have no right of action in the courts of New York, so his action cannot be maintained in this State."

In *Railway Company v. Ranney*, 37 Ohio St. 665, McIlvaine, J., said (page 669): "The principles of law in relation to the liability of a master for an injury to his servant while engaged in the performance of duties under his employment, have been so frequently considered and declared by this court, and upon such varied statements of fact, that one might be justified in assuming that the law upon this subject, in all its bearings, has been fully settled. The respective rights and duties of employer and employee, sound in contract. The employer implicitly engages to use reasonable care and diligence to secure the safety of the employee, and among other things, to exercise reasonable care in the selection of prudent fellow-servants. He also engages that every one placed in authority over the servant, with power to control and direct him in the performance of his duties, will exercise reasonable care in providing for his safety, whether such superior be a fellow-servant or not, in the ordinary sense."

There is strong ground to contend that Judge McIlvaine states the rule correctly. But, however that may be, and whether the action of the plaintiff in error sounds in contract or tort, in either case we think it is to be governed by the law of Pennsylvania. If the acts of the parties impose no obligations on the one hand and confer no rights upon the other, where they occur, no good reason is apparent why they should spring into active existence the moment the parties pass into another jurisdiction, where, if they had occurred therein, such relative rights and obligations would have resulted. An act should be judged by the law of the jurisdiction where it was committed ; the party acting or omitting to act must be presumed to have been guided by the law in force at the time and place, and to which he owed obedience ; if his conduct according to that law violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights. Nor is it material that the rules of Pennsylvania law that deny relief to plaintiff in error result from the adjudications of the courts of that State, instead of being legislative enactments. The rules of law established by judicial decisions are as binding as legislative enactments, until modified, or overturned by other decisions or legislative enactments binding within that jurisdiction.

In theory it may be true, that there is no common law of Ohio, or of Pennsylvania ; that the common law is one and the same in every State acknowledging its obligations, and that the decisions of one State are but evidence of it, not binding upon the courts of any other State ; but as matter of fact we know that in the application of the rules of the common law to the affairs of men, there is, unfortunately, in the several States a wide divergence ; and that it necessarily follows that acts and transactions, sufficient in one State to create a cause of action, will not produce that result in another, and in the administration of justice mere

theory must be made to yield to the truth as established by facts and experience.

Other questions were urged upon our consideration by counsel in argument, some, or all of which may be material upon the re-trial of the action, but they are not presented by the record in such manner as to authorize their consideration at this time, and will not be noticed.

*Judgment affirmed.*¹

BEACHAM v. PORTSMOUTH BRIDGE.

SUPREME COURT OF NEW HAMPSHIRE. 1896.

[Reported 68 New Hampshire, 382.]

CASE for negligence. Facts found by the court. The defendants own and possess a toll bridge over the Piscataqua River between Portsmouth and Kittery. On Sunday, April 29, 1894, the plaintiffs, having paid the required toll, were crossing the bridge, on a pleasure excursion, with a barge drawn by four horses, and while on the portion within the State of Maine one of the horses was injured by a defect in the bridge caused by the defendants' negligence. The plaintiffs seek to recover damages for the injury. The laws of Maine relating to the questions involved are a part of the case. A verdict in favor of the plaintiffs for \$150 was filed, which is to be set aside, and there is to be judgment for the defendants, if the action cannot be maintained. Otherwise there is to be judgment on the verdict.

CHASE, J.² If there is a conflict between the *lex loci* and the *lex fori*, the former governs in torts the same as in contracts, in respect to the legal effect and incidents of acts. Cool. Torts, 471; Sto. Conf. Law (7th ed.), § 307 d; Mostyn v. Fabrigas, Cowp. 161; Phillips v. Eyre, L. R. 4 Q. B. 225, 239; s. c. L. R. 6 Q. B. 1, 28; Smith v. Condry, 1 How. 28; Dennick v. Railroad, 103 U. S. 11; Walsh v. Railroad, 160 Mass. 571; Henry v. Sargeant, 13 N. H. 321; Laird v. Railroad, 62 N. H. 254. Therefore, whatever would be a defence to this action if it had been brought in the State of Maine is a defence here, although it would not be, if the cause of action had arisen in this State.

¹ The authorities generally hold that the question whether an employee may sue his employer in tort depends upon the law of the place where the injury happened. If an action lies by that law, it may be maintained in a place the law of which would not create an action. Chicago & E. I. R. R. v. Rouse, 178 Ill. 132, 52 N. E. 951; Walsh v. New York & New England Railroad, 160 Mass. 571, 36 N. E. 584. Conversely, if the *lex loci* permits no action, none may be maintained anywhere. Alabama G. S. R. R. v. Carroll, 97 Ala. 126, 11 So. 803; Turner v. St. Clair Tunnel Co., 111 Mich. 578, 70 N. W. 146; Njus v. Chicago M. & S. P. Ry. 47 Minn. 92, 49 N. W. 527. In a Swiss case the dictum of the principal case was followed, and the employer's liability held to be governed by the law of the place of hiring. 19 Clunet, 1064 (Swiss fed. trib., 4 Mar. '92). — ED.

² Part of the opinion is omitted. — ED.

By section 20, c. 124, Revised Statutes of Maine, a person who travels on the Lord's Day, except from necessity or for charity, may be punished. Walking for exercise (*O'Connell v. Lewiston*, 65 Me. 34; *Davidson v. Portland*, 69 Me. 116), carrying a disabled person to a ride to give him the benefit of air and exercise (*Sullivan v. Railroad*, 82 Me. 196), and carrying a visitor home who insists upon going (*Buck v. Biddeford*, 82 Me. 433), come within the exception; but travelling for pleasure is an offence under the statute, and has the effect to disable the offender from recovering damages for an injury to his person or team while so travelling, caused by the negligence of another. *Hinckley v. Penobscot*, 42 Me. 89; *Cratty v. Bangor*, 57 Me. 423; *Parker v. Latner*, 60 Me. 528; *Wheelden v. Lyford*, 84 Me. 114. . . .

The plaintiffs' injury having been received while they were travelling in the State of Maine upon a pleasure excursion on the Lord's day, prior to the enactment of the Maine statute of 1895, their rights are governed by the law of *Cratty v. Bangor*, and the other cases cited.

Verdict set aside. Judgment for the defendants.

LOUISVILLE AND NASHVILLE RAILROAD v. WHITLOW

COURT OF APPEALS OF KENTUCKY. 1897.

[*Reported 43 Southwestern Reporter, 711.*]

PAYNTER, J.¹ While T. P. Whitlow was in the service of the appellant as brakeman on one of its trains he is alleged to have been killed by gross and wilful negligence of the servants and employees of the appellant in charge of the train. At the time of his death he was a resident of this State, and his father qualified as his personal representative in the Warren County court. That the personal representative had the right to maintain the action, if the liability existed under the laws of Tennessee, cannot be questioned. *Bruce's Adm'r's v. Railroad Co.*, 83 Ky. 174; *Wintuska's Adm'r v. Railroad Co. (Ky.)*, 20 S. W. 819. He seeks to recover by virtue of the statute of Tennessee authorizing a recovery when death results from the wrongful act, fault, or commission of another, and the law as settled in that State in the administration of the statute. It is a well-settled principle in all civilized countries, so far as we are aware, that in matters *ex contractu* the *lex loci contractus* governs the construction and the validity of the contract, and that the *lex fori* governs the remedy. . . .

We can see no reason why the doctrine as established as to actions *ex contractu* may not be applied to actions *ex delicto*. There seem to be but few decisions on the question. In the case of *Nonce v. Railroad Co.*, 33 Fed. 434, it was held that there is no distinction on the subject

¹ Part of the opinion is omitted. — ED

between actions *ex contractu* and *ex delicto*. *Herrick v. Railway Co.*, 31 Minn. 11, 16 N. W. 413, was an action *ex delicto*, and the court held that the law of the place where the right was acquired or the liability incurred governs as to the right of action, while all that pertains merely to the remedy is controlled by the law of the State where the action is brought, thus recognizing the principle as the same where the right of action is *ex contractu* or *ex delicto*. The question presented to the court is whether the Kentucky or Tennessee law as to contributory negligence applies. Under the Tennessee law, if the intestate was himself guilty of negligence that contributed to his injury and death, yet if the defendant was guilty of negligence which was the direct and proximate cause of the intestate's injuries and death, then the plaintiff is entitled to recover, but the damages recoverable should be reduced or mitigated by reason of the intestate's contributory negligence. Under our law, if the intestate was guilty of such contributory negligence except for which his injuries and death would not have occurred, then there can be no recovery. Contributory negligence, under our rule, is never applied to the mitigation of damages. The question is whether the contributory neglect relates to the right or to the remedy. . . .

From all the facts attending the injury, it must be determined whether the defendant has incurred a liability for damages and the extent of it. The law of Tennessee must govern in fixing the liability and the quantum of recovery. It would be strange to apply the law of Tennessee in determining the question of liability, and take the law of the forum to fix the measure of recovery. It would be stranger still for the court to hold that the law of Tennessee should govern in fixing the liability; then apply the law of Kentucky, which would prevent a recovery, although a recovery is authorized by the law of Tennessee. It would be in one breath declaring the Tennessee law should determine the liability, and in the next instance adjudging that Kentucky law shall determine the liability and defeat a recovery. Suppose that, under the laws of this State, contributory negligence was not available in an action for the negligent killing of a human being, but in Tennessee it was. Could it be said, in an action brought in this jurisdiction for the negligent killing in Tennessee, that the law in that State allowing such a plea was not available as a defence because it related, not to the right of action, but to the remedy? It could not be said it pertained to the remedy. It would be a fact that would in part determine the question of liability or of the right of action. The conduct of the intestate is part of the facts from which the liability of the defendant is fixed, and measures the relief to which the personal representative is entitled. *Bruce's Adm'r v. Railroad Co.* was an action under the Tennessee statute. The court said: "We are of the opinion the action cannot be maintained and recovery had in this State in the same manner, for the same cause, and to the same extent as if the action had been brought and prosecuted in the State of Tennessee, where the cause of action arose." If contributory negligence is available to defeat a recovery in this case, then the

plaintiff cannot recover in the same manner and to the same extent as if the action had been brought in Tennessee. *Railroad Co. v. Graham's Adm'r*, 98 Ky. 688, 34 S. W. 229, was an action under the statute of Alabama for a negligent killing. The court held that the measure of damages, as determined by the decisions of the Alabama Supreme Court, should be applied in the case. The case of *Johnson v. Railroad Co.*, 91 Iowa, 248, 55 N. W. 66, is cited by counsel for appellant to sustain his contention that Kentucky law of contributory negligence should prevail. The injury in that case occurred in Illinois, and the action was brought in Iowa. The doctrine of comparative negligence prevailed in Illinois, and the Iowa court refused to follow the rule. The court disposed of the question in a few lines as to whether the doctrine of comparative negligence which had been established by the decisions of the courts of Illinois should prevail in that case. Kinne, J., took no part in the decision. Robinson, J., expressed no opinion on the question, but said that it was not necessarily involved in a determination of the case. *Knight v. Railroad Co.*, 108 Pa. St. 250, and *Herrick v. Railroad Co.*, 31 Minn. 11, 16 N. W. 413, are cited by the court to sustain its conclusion. In neither of these cases cited was the same question involved which the Iowa court adjudged, nor was there a similar question involved in them. The question in *Knight v. Railroad Co.* presents the right to maintain an action against a foreign corporation to recover damages in an action *ex delicto* for negligence causing the death in another State. The court held that such an action could be maintained. The Pennsylvania court recognized the correctness of the doctrine of *Herrick v. Railroad Co.*; and the court in the latter case said: "Whenever, by either common law or statute, a right of action has become fixed and a legal liability incurred, that liability, if the action be transitory, may be enforced, and the right of action pursued, in the courts of any State which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the State where it is sought to be enforced. . . . The statute of another State has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases, the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought; and we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*." Of course, there is no question of public policy involved in the case, because we have a statute of the same general import of the statute of Tennessee. *Dennick v. Railroad Co.*, 103 U. S. 11, was an action for injuries resulting in death, and the court held it was transitory. The court said: "It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or statute law of a State, a right

of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." At the time the injury was inflicted the right of action became fixed, and a legal liability was incurred. The liability which the plaintiff seeks to enforce was incurred by virtue of the law of Tennessee. The law of contributory negligence, as adjudged in this State, cannot be applied so as to alter or affect the right of action which arose in Tennessee. For these reasons the judgment is affirmed.¹

WOODEN *v.* WESTERN NEW YORK AND PENNSYLVANIA RAILROAD.

COURT OF APPEALS, NEW YORK. 1891.

[*Reported* 126 *New York*, 10.]

FINCH, J. This appeal is from an interlocutory judgment overruling a demurrer and determining that the complaint assailed stated a good cause of action. That pleading alleged that the plaintiff was and is a resident of this State, and the defendant, a corporation created and existing under our laws. The contest thus is between a resident individual and a domestic corporation. The latter owned and operated a line of railroad extending beyond our boundaries into the adjoining State of Pennsylvania, and the complaint alleged that in that State the plaintiff's husband was killed by the negligence of the defendant company. The complaint further averred that the statutes of that State gave a right of action for the injury sustained by the widow and children; that the remedy could be enforced in the name of the former as plaintiff, but for her own benefit and that of the children; and that such statute was of similar import to that existing in our own jurisdiction. Judgment was thereupon demanded for damages in the sum of twenty thousand dollars.

The demurrer interposed raised two objections: first, that the statutes of the two States were not similar, but different; and, second, that the action could not be maintained here in the name of the widow, but only in that of an executor or administrator of the deceased: and the final result sought to be established was that the widow could not maintain an action in this State because that is contrary to our statute, and that the administratrix could not because that is contrary to the Pennsylvania statute: and so, there is no remedy whatever in our jurisdiction.

Certain propositions essential to the inquiry before us have been

¹ *Acc.* *Bridger v. Asheville & S. R. R.*, 27 S. C. 456, 3 S. E. 860; *Ry. v. Lewis*, 89 Tenn. 235, 14 S. W. 603. — ED.

explicitly determined in *McDonald v. Mallory*, 77 N. Y. 546, and need no other citation for their support. That case held that the liability of a person for his acts, whether wrongful or negligent, depends in general upon the law of the place in which the acts were committed; that actions for injuries to the person in another State are sustained here without proof of the *lex loci* because they are permitted by the common law which is presumed to exist in the foreign State; that such presumption does not arise where the right of action depends upon a statute which confers it; and that in such case the action can only be maintained here by proof that the statutes of the State in which the injury occurred give the right of action and are similar to our own.

Upon the question of similarity we have also held that the two statutes need not be identical in their terms or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle and possessing the same general attributes. *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 53. It is quite evident that the two statutes are of similar import. They are founded upon the same principle, are aimed at the same evil, construct the same sort or kind of action, and give it for the benefit of the same class of individuals. In both the utter failure of redress at common law where the injury ended in death was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two statutes is not affected by the differences of detail which the demurrer points out.

The first is that by the *lex loci* the proper person to bring this action, and the only person who can maintain it, is the widow, while by our law the right of action is given to the executor or administrator. But it is given to the latter not in his broad representative character, but solely as trustee, in a case like the present, for the widow and children. *Hegerich v. Keddie*, 99 N. Y. 267. It is not a right which survives to the personal representatives, but a right created anew. The real parties in interest, those whose injury is redressed, whose right is vindicated, to whom all damages go, are one and the same in both forums. If the formal parties are different, the substantial and real parties are identical, and the difference in the trustee appointed by the law to represent their right is not such a difference as to bar our tribunals from their jurisdiction, or make the two statutes dissimilar under the rule.

It is claimed, however, that even in that event the right of action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so, should have been brought by the plaintiff not as widow, but as administratrix, to which office she had been appointed in this State. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci*, and vindicated here and in our tribunals upon principles of comity.

84 N. Y. 53, *supra*. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. We refer to the *lex fori* and measure it by and compare it with the *lex loci*, I think, for two reasons: one, that the party defendant may not be subjected to different and varying responsibilities, and the other, that we may know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do not refer to our law as creating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity, and, therefore, must be prosecuted here in the name of the party to whom alone belongs the right of action: and that rule the courts of Pennsylvania enforce where the cause of action arises here, by permitting it to be brought by the executor or administrator to whom by our law the right is given, although not by their own. *Usher v. West Jersey R. Co.*, 126 Penn. St. 207.

But the second difference relied on is that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our State they cannot exceed five thousand dollars. That restriction pertains to the remedy rather than the right. *Dennick v. Central Railroad of New Jersey*, 103 U. S. 11. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action or its inherent elements or character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principal of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks. There may be, there very possibly is, an exception to that rule, resting upon its own peculiar reasons, in a case where the defendant is not, as here, a domestic corporation, formed under our law, and so entitled to the benefit of our remedial limitations, but is a corporation of the State within whose jurisdiction the cause of action arose, and by whose law no restriction upon the amount of damages is permitted or enacted. We do not decide that question; but the same reasoning which would expose such a corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction. The difference between the two statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages, and that extent, as limited or unlimited, does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted. And so the causes of action in the two forums are not thereby made dissimilar. These views lead to an affirmance of the interlocutory judgment.

That judgment should be affirmed with costs, but with leave to the defendant to withdraw the demurrer and plead anew within twenty days after service of a copy of the judgment entered upon filing the remittitur, and upon payment of the costs of the action from the interposition of the demurrer to that date.

All concur.

*Judgment accordingly.*¹

NORTHERN PACIFIC RAILROAD v. BABCOCK.

SUPREME COURT OF THE UNITED STATES. 1894.

[*Reported 154 United States, 190.*]

THE plaintiff below, who was the administrator of the estate of Hugh M. Munro, sued in the District Court of the Fourth Judicial District of Minnesota to recover \$25,000 damages for the killing of Munro on the 10th day of January, 1888, at or near a station known as Gray Cliff on the Northern Pacific Railway in the Territory of Montana.

There was a verdict and judgment below in favor of the plaintiff for \$10,000. To review that judgment this writ of error was sued out. The errors assigned were as follows:

“Third. The court erred further in charging the jury as follows: ‘Many States have different laws. The law in this State until recently was that only \$5,000 could be given in a case of death. It has lately been increased to \$10,000.’

“Fourth. The court erred further in charging the jury as follows: ‘If you believe from all the evidence in the case that the plaintiff is entitled to recover, then it is for you to determine what compensation you will give for the death of the plaintiff’s intestate. The law of Montana limits it to such an amount as you think it would be proper under all circumstances of the case, and that is the law which will govern in this case.’

“Sixth. The court erred further in refusing to give to the jury the following request tendered by defendant’s counsel: ‘The laws of Minnesota limit the amount of damages to be recovered in this case to five thousand dollars.’”²

WHITE, J. The third, fourth, and sixth assignments involve the same question, and may be decided upon together.

¹ The right to recover damages for death is regulated by the law of the place of injury, not by that of the forum. *Louisville & N. R. R. v. Williams*, 113 Ala. 402, 21 So. 938; *Usher v. West Jersey R. R.*, 126 Pa. 206, 17 Atl. 597; *Goodman v. Ry.*, 14 Scot. L. R. 449.

The law of the place of injury rather than that of the place of death governs. *De Ham v. R. R.*, 86 Tex. 68, 23 S. W. 381; *Rudiger v. R. R.*, 94 Wis. 191, 68 N. W. 661. — Ed.

² Only so much of the case as deals with these assignments of error is given. — Ed.

The plaintiff's intestate was an engineer in the employ of the defendant corporation in the Territory of Montana, and the accident by which he lost his life occurred there. The law of the Territory of Montana at the time provided as follows:

"Where the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his action, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just." (Section 14, title II., chapter I., first division of the Code of Civil Procedure of the Territory of Montana.)

Under the law of Minnesota, when the death occurred, the limit of recovery in case of death was \$5,000, but at the time of the trial of the case in the court below this limit had been increased to \$10,000 by amendment of the Minnesota statutes.

The question which those assignments of errors present is, was the amount of damage to be controlled by the law of the place of employment and where the accident occurred, or by the law of the forum in which the suit was pending? In the case of *Herrick v. Minneapolis & St. Louis Railway Co.*, reported in 31 Minnesota, 11, which involved the question of whether the courts of Minnesota would enforce and apply to a suit in that State for a cause of action originating in Iowa a law of the State of Iowa making railroad corporations liable for damages sustained by its employees in consequence of the neglect of fellow-servants, the court said:

"The statute of another State has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*.

"The defendant admits the general rule to be as thus stated, but contends that as to statutory actions like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text-writers — notably, Rorer on Interstate Law — seem to lay down this rule, but the authorities cited generally fail to sustain it.

"But it by no means follows that, because the statute of one State differs from the law of another State, therefore it would be held contrary to the policy of the laws of the latter State. Every day our courts are enforcing rights under foreign contracts where the *lex loci*

contractus and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the State where made. To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the State of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

This opinion of the Supreme Court of Minnesota is in accord with the rule announced by Chief Justice Marshall in *The Antelope*, 10 Wheat, 66. In referring to that case in *Texas & Pacific Railway v. Cox*, 145 U. S. 593, the court said: "the courts of no country execute the penal laws of another. But we have held that that rule cannot be invoked as applied to a statute of this kind, which merely authorizes a civil action to recover damages for a civil injury." The rule thus enunciated had been adopted in previous cases, and has since been approved by this court. *Smith v. Condry*, 1 How. 28; *The China*, 7 Wall. 53, 64; *Dennick v. Railroad Co.*, 103 U. S. 11; *The Scotland*, 105 U. S. 24, 29; *Huntington v. Attrill*, 146 U. S. 657, 670. Indeed, in *Texas & Pacific Railway Co. v. Cox*, *supra*, Mr. Chief Justice Fuller, speaking for the court, said: "The question, however, is one of general law, and we regard it as settled in *Dennick v. Railroad Co.*"

The contract of employment was made in Montana, and the accident occurred in that State, while the suit was brought in Minnesota. We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*.

THE "HALLEY."

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1868.

[*Reported Law Reports, 2 Privy Council*, 193.]

SELWYN, L. J. This is an appeal from an order by the judge of the High Court of Admiralty, dated the 26th of November, 1867, and admitting the third article of the reply filed by the plaintiffs in the court below, who are the present respondents.

The cause is a cause of damage promoted by the respondents as owners of a Norwegian barque called the "*Napoleon*," against a British steamship called the "*Halley*," and her owners, for the recovery of damages occasioned to the respondents by reason of a

collision which took place on the 8th of January, 1867, in Flushing Roads, between the "Napoleon" and the "Halley."

In their petition the respondents state that the collision was caused by the negligent and improper navigation of the "Halley."

The appellants, in their answer to that petition, state that the "Halley" is a steamship belonging to the port of Liverpool, and that "by the Belgian or Dutch laws which prevail in and over the river Scheldt, and to which the said river is subject, from the place where the said river pilot came on board the 'Halley,' and thence up to and beyond the place of the aforesaid collision, it was compulsory on the said steamer to take on board and be navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws; and it was by virtue of such laws that the 'Halley' was compelled to take on board and to be given in charge, and until the time of the said collision, as aforesaid, to remain in charge of, and did take on board, and was given in charge, and up to the time of the said collision remained in charge of the said river pilot, who was duly appointed or licensed according to the said laws, and whom the defendants or their agents did not select and had no power of selecting; and "that the collision was not caused by the negligence, default, want of skill, or improper conduct of any person on board the 'Halley,' except the said river pilot."

In reply to this answer, the respondents pleaded the following, being the third article in their reply: "By the Belgian or Dutch laws in force at the time and place of the said collision, the owners of a ship which has done damage to another ship by collision, are liable to pay and make good to the owners of such lastly mentioned ship all losses occasioned to them by reason of such collision, notwithstanding that the ship which has done such damage was, at the time of the doing thereof, being navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws, and notwithstanding that such damage was solely occasioned by the negligence, default, or want of skill of such pilot, without any contributory negligence on the part of the master or crew of such lastly mentioned ship, and notwithstanding that it was at the time and place of the collision, by the said laws, compulsory on such lastly mentioned ship to be navigated under the direction and in charge of such pilot; and the defendants, the owners of the 'Halley,' are by virtue of the said laws, liable to pay and make good to the plaintiffs all losses occasioned to them by the said collision, even if the statements contained in the eleventh article of the said answer be true."

The appellants having moved the court below to reject the third article of the reply, on the ground that, even if the third article were true, the appellants would not be liable in the Court of Admiralty in England, the learned judge of that court has made the order now under appeal, by which he has refused the motion of the appellants, and has sustained the third article of the reply.

The claim of the respondents is stated by the learned judge to be founded upon a tort committed by the defendants in the territory of a foreign State, and we are not called upon to pronounce any opinion as to the rights which the respondents might have obtained, either against the appellants as the owners of the "Halley," or as against the ship, if the respondents had instituted proceedings and obtained a judgment in the foreign court. For this cause is a cause for damage instituted by petition in the High Court of Admiralty in England; and it is admitted by the counsel for the respondents that the question before us must be decided upon the same principles as would be applicable to an action for damages for the collision in question if commenced in the Court of Queen's Bench or Common Pleas. But it is contended on their part, and has been held by the learned judge in the court below, that the respondents are entitled to plead that the law of Belgium, within whose territorial jurisdiction the collision took place, renders the owners of the "Halley," although compelled to take a pilot on board, liable to make reparation for the injury which she has done.

Their Lordships agree with the learned judge in his statement of the common law of England, with respect to the liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel, while under the control of a pilot, whom the owner was compelled to take on board, and in whose selection he had no voice; and that this law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third persons are concerned, must always be considered as the acts of the owner.

This exemption of the owner from liability when the ship is under the control of what has been termed a "compulsory pilot" has also been declared by express statutory enactments. *Vide* Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, § 388.

In cases like the present, when damages are claimed for tortious collisions, a chattel, such as a ship or carriage, may be, and frequently is, figuratively spoken of as the wrongdoer; but it is obvious, that although redress may sometimes be obtained by means of the seizure and sale of the ship or carriage, the chattel itself is only the instrument by the improper use of which the injury is inflicted by the real wrongdoer.

Assuming, as, for the purposes of this appeal, their lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the common law and statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense the servant of the appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who, so far from being bound

to receive or obey their orders, was entitled to supersede, and had, in fact, at the time of the collision, superseded, the authority of the master appointed by them; and their lordships think that the maxim, "*qui facit per alium, facit per se*," cannot by the law of England be applied, as against the appellants, to an injury occasioned under such circumstances; and that the tort upon which this cause is founded is one which would not be recognized by the law of England as creating any liability in, or cause of action against, the appellants.

It follows, therefore, that the liability of the appellants, and the right of the respondents to recover damages from them, as the owners of the "Halley," if such liability or right exists in the present case, must be the creature of the Belgian law; and the question is, whether an English court of justice is bound to apply and enforce that law in a case, when, according to its own principles, no wrong has been committed by the defendants, and no right of action against them exists.

The counsel for the respondents, when challenged to produce any instance in which such a course had been taken by any English court of justice, admitted his inability to do so, and the absence of any such precedent is the more important, since the right of all persons, whether British subjects or aliens, to sue in the English courts for damages in respect of torts committed in foreign countries has long since been established; and, as is observed in the note to *Mostyn v. Fabrigas*, in *Smith's Leading Cases*, vol. i. p. 656, there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which had prevailed to the contrary seems to be erroneous.

In the case of "*The Amalia*," 1 Moore's P. C. Cases (n. s.) 484, Lord Chelmsford, in delivering the opinion of the judicial committee, said: "Suppose the foreigner, instead of proceeding *in rem* against the vessel, chooses to bring an action for damages in a court of law against the owners of the vessel occasioning the injury, the argument arising out of the acquired lien would be at once swept away, and the rights and liabilities of the parties be determined by the law which the court would be bound to administer."

As Mr. Justice Story has observed in his *Conflict of Laws*, p. 32, "it is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extraterritorial effect, when those laws are prejudicial to the rights of the other nations or to those of their subjects." And even in the case of a foreign judgment, which is usually conclusive *inter partes*, it is observed in the same work, at § 618A, that the courts of England may disregard such judgment *inter partes* if it appears on the record to be manifestly contrary to public justice, or to be based on domestic legislation not recognized in England or other foreign countries, or is founded upon a misapprehension of what is the law of England. *Simpson v. Fogo*, 1 H. & M. 195.

It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their lordships' opinion, alike contrary to principle and to authority to hold, that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

The case of *Smith v. Condry*, 1 Howard's Rep. (U. S.) 28, in the Supreme Court of the United States, appears at first sight to have an important bearing upon this case; but, upon an investigation of the report, it does not appear that any question as to a conflict between the English law and the American law was discussed in that case, or that the precise point now under consideration was noticed in the judgment, nor is it specifically mentioned in any of the three exceptions which were taken to the decision of the inferior court, and there is no report of the arguments.

Their lordships think, therefore, that that case cannot be treated as an authority sufficient to support the contention of the respondents; and, on the whole, they think it their duty humbly to advise Her Majesty to allow this appeal, and to order that the third article of the plaintiff's reply be rejected, and that there should be no costs of this appeal.¹

THE "SCOTLAND."

SUPREME COURT OF THE UNITED STATES. 1881.

[*Reported 105 United States, 24.*]

BRADLEY, J.² The steamship "Scotland," belonging to the National Steam Navigation Company, a corporation of Great Britain, sailed from New York for Liverpool, on the 1st of December, 1866, with

¹ See *The Augusta*, 57 L. T. Rep. 326. — Ed.

² Part of the opinion is omitted. — Ed.

freight and passengers ; and after reaching the high sea, opposite Fire Island light, ran into the American ship "Kate Dyer," bound from Callao, in the republic of Peru, to New York, laden with a cargo of guano. The "Kate Dyer" immediately sank, and ship and cargo were totally lost. The steamship suffered so severely from the collision that she put back, but was unable to get further than the middle ground outside and south of Sandy Hook, where she also sank and became a total loss, with the exception of some stripping of ship's material, consisting of anchors, chains, rigging, and cabin furniture got from her by the Coast Wrecking Company before she went down. Libels in personam were filed in the District Court for the Eastern District of New York, against the Steam Navigation Company by the owners of the "Kate Dyer," the Peruvian government, owner of her cargo, and by a passenger and some of the crew who lost certain effects by the sinking of the ship. Personal service of process not being obtainable, the marshal attached another vessel belonging to the steamship company, lying in the port of New York, which was duly claimed and released on stipulation, and the steamship company appeared and responded to the libel. The answer admitted the collision, but denied that the "Scotland" was in fault, and further alleged as follows : "Respondents further answering say, that said steamer 'Scotland' was by said collision sunk and destroyed, and that there is no liability in personam against these respondents for said loss of the 'Kate Dyer.'" Proofs being taken, the District Court rendered a decree in favor of the libellants, which, on appeal to the Circuit Court, was substantially affirmed. The owners of the "Kate Dyer" were awarded \$56,000, with interest ; the owners of the cargo, \$57,375, with interest ; and the passengers and crew, upwards of \$11,000 with interest.

On the trial in the Circuit Court, the respondents, besides contesting the question of fault and general liability, again insisted upon the benefit of the limited liability law, and proposed for adoption by the court a certain finding of fact and conclusion of law looking to that end. The finding of fact was substantially adopted by the court as follows :

"The steamer was, by reason of the said collision and in consequence thereof, so injured that, although at once put about, she could only reach the 'outer middle,' so called, on the west side of the channel south of Sandy Hook, where she sank and became a total loss, except that a large amount of anchors, chains, rigging, and cabin furniture, of the value of several thousand dollars, was saved from her and delivered to the agent of the respondents. She earned no freight, the voyage being broken up. The passage-money paid in advance by the passengers was \$1,703.65 ; of this \$225 was refunded to such of them as could not wait to be transported by the respondents in another vessel of their line ; the remaining passengers were forwarded by the 'Queen,' and the expense charged to the 'Scotland.' Irrespective of the carriage of the passengers by the 'Queen,' the respondents paid return money as above, \$225, and the expenses of bringing the passengers to

New York, and taking care of them before they were reshipped, \$566.83, in all, \$791.83; the balance of the passage-money, \$911.82, was credited to the 'Queen' and charged to the 'Scotland.'"

The conclusion of law proposed and insisted on by the respondents as legitimately arising upon this fact was as follows, to wit:

"The liability of the respondents, as owners of the said steamship 'Scotland,' did not extend beyond the value of their interest in the vessel and her pending freight at the time of the collision; and the vessel having been lost by the collision, and no freight or passage money earned, the respondents are thereby discharged from any liability on account thereof."

The Circuit Court, as before stated, refused any relief grounded on the limited liability law, but made a decree against the respondents for the total amount of damages sustained by the various parties in interest. To this conclusion the respondents excepted.

Both parties appealed from the decree, and the case is now before us for review. The appeal of the libellants was based on what they supposed to be an erroneous conclusion of the court in reference to the allowance of interest, and the estimation of the value of the cargo.

The principal question raised and argued on this appeal is, whether the steamship company is entitled to the benefit of a limited responsibility equal to the value of the steamship and freight after the collision occurred, — a liability which, in this case, as the vessel and freight were a total loss, would only amount to the value of the articles saved by the wrecking company. It is contended by the company that it is entitled to the benefit of such limitation, either under the general maritime law or under the act of Congress of March 3, 1851, c. 43. On the other side, it is contended that the general maritime law on this subject (if there be any) is not in force in this country, and that the benefit of the act of Congress cannot be claimed by foreign vessels. It is further contended by the libellants that the steamship company, even if it might have had the benefit of the rule, failed to take the proper steps for obtaining it, — first, in not filing a petition according to the rules of this court; and, secondly, in not surrendering the property recovered from the wreck, or its proceeds.

In the case of *Norwich Company v. Wright*, 13 Wall. 104, we had occasion to state that the general maritime law of Europe only charges innocent owners to the extent of their interest in the ship for the acts of the master and crew, and that if the ship is lost their liability is at an end. This rule is laid down in several places in the ancient code called the *Consolato del Mare*, and in many other authorities which are quoted and commented upon by Judge Ware in the case of "*The Rebecca*," Ware, 187; and it is specifically formulated in various national ordinances and codes, amongst others, in the *Marine Ordinance of Louis XIV.*, adopted in 1681. Emerigon, in his treatise of Contracts "*à la Grosses*," says: "The owners of the ship are bound *in solidum* by everything which the captain does in the course of the

voyage for the promotion of the voyage. . . . But this action *in solidum* does not exist against the owners farther than according to the interest which they have in the body of the ship; hence, if the ship perish, or if they abandon their interest, they are no longer liable for anything. It is thus that the maritime laws of the Middle Age have directed; such is the law which is observed in the North; and such is the regulation of our own ordinance:" and he refers to the Consolato and other authorities. The text of the French ordinance, which is regarded as merely formulating the old customary law, is as follows: "The owners of ships are responsible for the acts of the master, but they become discharged therefrom by abandoning the ship and freight."

But whilst this is the rule of the general maritime law of Europe, it was not received as law in England nor in this country until made so by statute. The English statutes, indeed, have not yet adopted, to its full extent, the maritime law on this subject. They make the owners responsible to the value of ship and freight at the time of the injury (that is, immediately before the injury), although the ship be destroyed, or injured by the same act, or afterwards in the same voyage; whilst our law adopts the maritime rule of graduating the liability by the value of the ship after the injury, as she comes back into port, and the freight actually earned; and enables the owners to avoid all responsibility by giving up ship and freight, if still in existence, in whatever condition the ship may be; and, without such surrender, subjects them only to a responsibility equivalent to the value of the ship and freight as rescued from the disaster.

But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawana*, 21 Wall. 558, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law, and must be interpreted and administered as such. Then, does it govern the present case?

In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or State, they are generally to be determined by the laws of that State. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was.¹ If not shown,

¹ It is generally held that a marine tort occurring within the territorial waters of a State, even upon or between vessels of other States or of the forum, is governed by

we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But, if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly.¹ If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision. In all other cases, each nation will also administer justice according to its own laws. And it will do this without respect of persons, to the stranger as well as to the citizen. If it be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charterparty, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. But the great mass of the laws are, or are intended to be, expressive of the rules of justice and right applicable alike to all.

The act of Congress creating a limited responsibility of shipowners in certain cases, first passed March 3, 1851, and reproduced in sects. 4282-4289 of the Revised Statutes, is general in its terms, extending to all owners of vessels without distinction or discrimination. It declares that "the liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employees, but risk only the amount of their capital stock in the corpor-

the law of the State within whose waters it occurs. *The Moxham*, 1 P. D. 43; *Smith v. Condry*, 1 How. 28; 17 Clunet, 963 (Cass. Florence, 26 Nov. '88); 20 Clunet, 902 (Germany, 9 July, '92); 23 Clunet, 130 (Cass. France, 18 July, '95).

But see *In re State S. S. Co.*, 60 Fed. 1018. — ED.

¹ *Acc. Kendrick v. Burnett*, 35 Scot. L. R. 62. — ED.

ation. The doctrine of *respondet superior*, it is true, applies to the corporations themselves ; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of shipowners, "Men would be deterred from owning and operating ships, if they were subject to the fear of an indefinite liability for the acts of the master." *Jure B. & P.*, lib. 2, c. 11. § 13.

But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases. We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever the parties choose to resort to our courts for redress. Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor.

English cases have been cited to show that the courts of that country hold that their statutes prior to 1862, which in generality of terms were similar to our own, did not apply to foreign ships. See *The Nostra Signora de los Dolores*, 1 *Dod.* 290 ; *The Carl Johan*, cited in *The Dundee*, 1 *Hagg. Adm.* 109, 113 ; *The Girolamo*, 3 *Hagg. Adm.* 169, 186 ; *The Zollverein*, 1 *Swa.* 96 ; *Cope v. Doherty*, 4 *Kay & J.* 367 ; s. c. 2 *DeG. & J.* 614 ; *The General Iron Screw Collier Co. v. Schurmanns*, 1 *John. & H.* 180 ; *The Wild Ranger*, 1 *Lush.* 553. We have examined these cases. So far as they stand on general grounds of argument, the most important consideration seems to be this, that the British legislature cannot be supposed to have intended to prescribe regulations to bind the subjects of foreign States, or to make for them a law of the high sea ; and that if it had so intended, it could not have done it. This is very true. No nation has any such right. Each nation, however, may declare what it will accept and, by its courts, enforce as the law of the sea, when parties choose to resort to its forum for redress. And no persons subject to its jurisdiction, or seeking justice in its courts, can complain of the determination of their rights by that law, unless they can propound some other law by which they ought to be judged ; and this they cannot do except where both parties belong to the same foreign nation ; in which case, it is true, they may well claim to have their controversy settled by their own law. Perhaps a like claim might be made where the parties belong to different nations having the same system of law. But where they belong to the country in whose forum the litigation is instituted, or to different countries having different systems of law, the court will administer the maritime law as accepted and used by its own sovereignty.

The English courts say that, as foreigners are not subject to their

law, nor entitled to its benefits, they will resort to the general law of general liability when foreigners are litigants before them. Where do they find such general law? In the law of nature? or the civil or common law? Is not the maritime law, as their own legislature or national authority has adopted it, as imperative as either of these? Does it not, in the British judicial conscience, stand for the law of nature, or general justice? As for the civil and common laws, they are only municipal laws where they have the force of laws at all. The better grounds for the English decisions seem to be the peculiar terms of the acts of Parliament on the subject, and the supposed policy of those acts, as being intended for the encouragement of the British marine. From these considerations, as grounds of construction, the conclusion may have been properly deduced that the law was intended to be confined to British ships. The question, it is true, has ceased to be of practical importance in England, since the act of 1862 (25 & 26 Vict., c. 63), by which the owners of any ship, British or foreign, are not to be answerable, without their actual fault or privity, for any loss or damage to person or property, to an amount exceeding £15 per ton of the ship's registered tonnage, or its equivalent in case of foreign ships. But the former English decisions are thought to have a bearing on our law, because the acts of Parliament to which they related, in their principal clauses, were conceived in the same broad and general terms as our act of Congress. Some of the clauses of the British acts, however, relating to registered tonnage and other particulars, admitted only a special application to British ships; and perhaps these clauses did require a restricted construction of the whole acts to such ships.

But there is no demand for such a narrow construction of our statute, at least of that part of it which prescribes the general rule of limited responsibility of shipowners. And public policy, in our view, requires that the rules of the maritime law as accepted by the United States should apply to all alike, as far as it can properly be done. If there are any specific provisions of our law which cannot be applied to foreigners, or foreign ships, they are not such as interfere with the operation of the general rule of limited responsibility. That rule, and the mode of enforcing it, are equally applicable to all. They are not restricted by the terms of the statute to any nationality or domicile. We think they should not be restricted by construction. Our opinion, therefore, is that in this case the National Steamship Company was entitled to the benefit of the law of limited responsibility.¹ . . .

¹ *Acc.* The *Leon*, 6 P. D. 148; The *Belgenland*, 114 U. S. 355; 17 Clunet, 332 (Hamburg, 24 Sept. '88); 20 Clunet, 221 (Antwerp, 23 July, '92). In France the responsibility for a collision is said to be governed by the law of the offending vessel. 19 Clunet, 153 (Cass. 4 Nov. '91). It has been held in Scotland that for collision on the high seas no action will lie, unless the collision was tortious by the law which governed both vessels. *Kendrick v. Burnett*, 35 Scot. L. R. 62.

In the case of salvage, it has been held that the right is governed by the law of the salving vessel. 11 Clunet, 512 (French Cass. 6 May, '84); 16 Clunet, 720 (Antwerp, 9 March, '89.) — Ed.

CHAPTER X.

OBLIGATIONS EX CONTRACTU.

SECTION I.

PLACE OF CONTRACTING.

BARING v. INLAND REVENUE COMMISSIONERS.

COURT OF APPEAL. 1897.

[Reported [1898] 1 *Queen's Bench*, 78.]

THE question raised was whether an unregistered bond, of which the appellant, the Honourable J. Baring, was the holder, whereby the Atchison, Topeka and Santa Fé Railway Company, a corporation organized under the laws of Kansas, in the United States (hereinafter called the new company), promised to pay to bearer, or, if the bond should be registered as thereafter provided, to the registered holder thereof, the sum of 1,000 dollars with interest thereon at the rate of 4 per cent per annum until the principal became due, was subject to duty under the Stamp Act, 1891, as being a marketable security by or on behalf of a foreign company made or issued in the United Kingdom within s. 82, sub-s. (b), (i.), of that act.¹

A. L. SMITH, L. J. I am of opinion that this appeal should be dismissed. It is not necessary for me to state the facts in detail. They may be summarized as follows. There was a company called the Atchison, Topeka and Santa Fé Railway Company, incorporated under the law of Kansas. In 1895 that company was in difficulties, and a reorganization scheme was set on foot. By that scheme there was to be a foreclosure suit against the old company, which was to be wound up, a new company was to come into existence in its stead, and the bondholders of the old company were to become bondholders of the new company. The scheme was carried out in 1896. The new company, in pursuance of the scheme, issued bonds, the form of which is very material. There is an express stipulation on the face of the bond that it shall not be valid for any purpose unless authenticated by the certificate thereon indorsed of the trustee under the mortgage or deed

¹ The statement of facts and arguments of counsel are omitted. — Ed.

of trust. The document seems to me on the face of it not really to be a bond, but a mere piece of paper till that certificate is signed. What happened in this case was this. One of these documents was sent from New York to London in order that it might be handed over to the appellant, who, as having been a bondholder of the old company, was entitled to a bond of the new company. Instead, however, of converting the document into a bond in New York, in order to avoid the payment of a heavy premium for insurance, it was sent over here as an inchoate instrument, and not a bond at all, and the vice-president of the trust company also came over to this country to sign the requisite certificate here and so convert the document into a bond. The certificate having been thus signed, the bond was delivered to Messrs. Baring Brothers & Co., and by them handed over to the appellant. The question which arises is, where was this bond issued? It was contended that it was issued in New York when the piece of paper was given to the trust company. I say certainly not. It is true that a piece of paper was then handed to the trustee, but it cannot be said that a bond was then issued, for it was not. I do not think there can be an issue of an instrument within the statute until it is an actual, valid, subsisting instrument. I think that this bond was first issued in this country after it became a valid instrument by the signing of the indorsed certificate thereon, until which time it was a mere piece of paper and not a bond. I cannot understand how it can be said that a bond has been issued before it is a bond. It became a marketable security when the certificate was signed, and not till then. For these reasons I think that the appeal should be dismissed.

RIGBY, L. J.¹ I am of the same opinion. The sole question really appears to me to be whether this instrument, which came into the hands of the appellant as the person entitled to it under the scheme of reorganization, was issued in this country or not, and I cannot entertain any doubt that it was so issued. What is the meaning in any fair sense of the word "issued" in the section? Of course a document is not issued if, when sealed, it is put away in a box and kept there. Nor do I consider that a document, even if it were complete when signed, could be said to be issued, if it were handed over to an agent with instructions that he was not to part with it or make it an instrument on which any one could sue until some consideration was received, as in the case of an ordinary mortgage deed which is sealed but is not to be handed over to the mortgagee or to become an effective mortgage deed until the mortgage money is paid. It seems to me impossible to argue that in such cases there could be said to be an issue in America, even if the document were complete when signed, if it were only to be handed over to the person who was to sue upon it upon something being done, as, for example, on paying the consideration money. An instrument can only be said to be issued in my opinion when it gets into the hands of a

¹ Part of this opinion and the concurring opinion of COLLINS, L. J., are omitted. — Ed.

person who can avail himself of it. It seems to me that that is the ordinary meaning of the word "issued," and at any rate its meaning in the act which we have to construe. When this document was executed by the company in America, had everything been done that was necessary to make it an available instrument? Certainly not. On the contrary, it was guarded by a condition on the face of the document that it should have no validity until certified by the trust company. It was argued that, as the trust company were dealing with the matter under the orders and directions of the joint executive committee, the bond had gone beyond the control of the railway company, and that constituted the test as to whether it had been issued. I cannot accede to that view. In the instance which I gave of an instrument being sent to an agent with instructions to deliver it to a person on payment of the consideration money, the instrument would be beyond the control of the sender in the sense in which this bond was beyond the control of the railway company. The company had a bargain which was to be fulfilled, and, unless it were fulfilled, they could not get the advantages for which they had bargained. During the transmission of the document from New York, and until the certificate was signed, no one could sue on it. Until the certification there could be no issue. I do not say that there was an issue upon the certification; but when the certified bond, being then a complete instrument, which might be sued upon if handed over to a person who was entitled to it, was handed over to such a person, I do not doubt there was an issue. There can be only one issue within the meaning of the act, and that is when the instrument first gets into the hands of some one who can make it available for his benefit.¹

NORTHAMPTON MUTUAL LIVE STOCK INSURANCE
CO. v. TUTTLE.

SUPREME COURT, NEW JERSEY. 1878.

[Reported 40 *New Jersey Law*, 476.]

VAN SYCKEL, J.² The plaintiff brought suit before a justice of the peace of the county of Warren, to recover the amount of an assessment made against the defendant upon a policy of insurance issued to him by the plaintiff company. The plaintiff recovered a judgment before the justice, which was reversed in the Warren Common Pleas, on the ground that the insurance company, plaintiff, was a foreign insurance

¹ *Acc. Aultman v. Holder*, 68 Fed. 467. The place of delivery of a bond or negotiable instrument is the place of contracting, not the place where the instrument is written or signed. *Young v. Harris*, 14 B. Mon. 556; *Watson v. Lane*, 52 N. J. L. 550, 20 Atl. 894; *Pugh v. Cameron*, 11 W. Va. 523.—ED.

² Part of the opinion is omitted. — ED.

company, and that the contract was a New Jersey contract, negotiated by an agent in New Jersey, contrary to our statute. Nix. Dig. 435, § 66; Ib. 436, § 73.

The policy was dated May 27, 1872, and insured defendant for the term of one year. An assessment was made July 2, 1872, which paid the company's losses to that date. The losses from July 2, 1872, to January 14, 1873, amounted to about \$12,000, and this sum was the basis of the assessment for which the defendant was sued.

The property insured was in this State, where the defendant and Thatcher, one of the directors of the insurance company, resided when the policy was issued.

The application was signed by the defendant in this State, where Thatcher gave him a receipt, of which the following is a copy:

“Northampton Mutual Live Stock Insurance Company, of Northampton County, Pa.

“Received of Wm. Tuttle, for an insurance by the Northampton Mutual Live Stock Insurance Company against loss by death upon the animals described in application, the sum of one dollar and thirty cents, being the amount paid for membership for the term of one year from the 27th day of May, 1872, for which said company agrees to issue a policy to said applicant when the application is approved, and if not approved, the above amount to be refunded to the said applicant.

“J. B. THATCHER,
Dated May 27, 1872. *Agent.*”

Article VI. of the by-laws of the company provided that the agent of the company should give a receipt for the premium paid, and that the insurance should take effect from that time, provided the application was approved by the board of directors, or its executive committee, after which the policy would be issued; and if not approved, the money would be refunded.

In this case the application for insurance was taken by Thatcher to Easton, in the State of Pennsylvania, where it was approved by the directors of the company, and the policy was there issued and sent by mail to the defendant, in New Jersey.

If the contract of insurance was made in the State of Pennsylvania, and was valid there, comity requires us to enforce it here. *Columbia Ins. Co. v. Kinyon*, 8 Vroom, 33.

This case, therefore, turns upon the question whether it was made in this State.

Thatcher acted as the agent of the company, with authority to receive applications. He received the defendant's application, with the premium, which he transmitted to the company at its place of business in Pennsylvania. By the express terms of the receipt given by the agent to the defendant, the company had the option to approve the application and issue a policy, or to reject it and refund the premium.

It was a mere proposition, from which the parties might have receded, and not a contract. Approval by the company was necessary to ripen it into a contract. Not until then did the minds of the parties come together, and invest the transaction with the attributes of a valid agreement. The contract of insurance must be regarded as having been made when the company approved the defendant's application, and issued and transmitted to him their policy. *Hyde v. Goodnow*, 3 N. Y. 266; *Huntley v. Merrill*, 32 Barb. 626.

The contract must be held to have been made where the last act necessary to complete it was done.

Although there is some conflict in the cases, I think the weight of authority is, that when the offer of the insured was accepted, and the policy deposited in the post office by the company, properly addressed to the insured, the contract was made. It did not remain incomplete until the insured, by receiving the policy, was notified of the acceptance of his proposal. . . .

It being conceded that the approval of the application was given in Pennsylvania, and the policy mailed there, the contract must be adjudged to have been made in that State, and not in New Jersey. The contract, therefore, is valid, and comity requires its enforcement here. *Columbia Fire Insurance Co. v. Kinyon*, 8 Vroom, 33. . . .

The judgment of the Warren Pleas, that the contract was void under the statute law of this State, was erroneous, and should be set aside.¹

EQUITABLE LIFE ASSURANCE SOCIETY v. CLEMENTS.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 140 *United States*, 226.]

THIS was an action brought by Alice L. Wall, a citizen of Missouri and widow of Samuel E. Wall, and prosecuted by Benjamin F. Pettus, her administrator, against the Equitable Life Assurance Society of the United States, a corporation of New York and doing business in Missouri, on a policy of insurance executed by the defendant at its office in the city of New York on December 23, 1880, upon the life of Samuel E. Wall, by which, in consideration of the payment of \$136.25 by him, and of the payment of a like sum on or before December 15 in each year during the continuance of the contract, it promised to pay to Alice L. Wall, his wife, \$5,000 at its office in the city of New York, within sixty days after satisfactory proofs of his death.² . . .

¹ *Acc. Com. Mut. Fire Ins. Co. v. Wm. Knabe Mfg. Co.*, 171 Mass. 265, 50 N. E. 516; *Hyde v. Goodnow*, 3 N. Y. 266. See *Voorheis v. Peoples' Mut. Ben. Soc.*, 91 Mich. 469, 51 N. W. 1109; *Davis v. Ins. Co.*, 67 N. H. 218, 34 Atl. 464; *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969. — ED.

² The statement of facts and part of the opinion are omitted. — ED.

GRAY, J. Upon the question whether the contract sued on was made in New York or in Missouri, there is nothing in the record, except the policy and application, the petition and answer, by which the facts appear to have been as follows: The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy, executed at the defendant's office in New York, provides that "the contract between the parties hereto is completely set forth in this policy and the application therefor, taken together." The application declares that the contract "shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance." The petition alleges that that premium and two annual premiums were paid in Missouri. The answer expressly admits the payment of the three premiums, and, by not controverting that they were paid in Missouri, admits that fact also, if material. Missouri Rev. Stat. 1879, § 3545. The petition further alleges that the policy was delivered in Missouri; and the answer admits that the policy was, "at the request of the said Wall, transmitted to the State of Missouri and was delivered to said Wall in said State." If this form of admission does not imply that the policy was at the request of Wall transmitted to another person, perhaps the company's agent, in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri. Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri. . . .

It follows that the insertion, in the policy, of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid, as well as the insertion, in the application, of a clause by which the beneficiary purports to "waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State, or not," is an ineffectual attempt to evade and nullify the clear words of the statute.

*Judgment affirmed.*¹

¹ *Acc. Hicks v. Ins. Co.*, 60 Fed. 690; *Ford v. Ins. Co.*, 6 Bush, 133; *Cromwell v. Ins. Co.*, 49 Md. 366; *Fidelity Mut. L. Ass. v. Ficklin*, 74 Md. 172, 21 Atl. 680; *Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59; *Estate of Breitung*, 78 Wis. 33, 46 N. W. 891. — ED.

STAPLES v. NOTT.

COURT OF APPEALS, NEW YORK. 1891.

[Reported 128 New York, 403.]

GRAY, J. The promissory note in suit bears date at Washington, D. C., April 5, 1889; was made payable at a bank in Watertown, N. Y., and carried interest at the rate of seven per cent per annum. The appellant was indorser upon it, and defends on the ground of usury. If the contract of the parties, which is evidenced by this note, was governed by the laws of this State, the defence should have prevailed; but if made under the laws of the District of Columbia the judgment was right and should be sustained.

The note was given in renewal of a balance due upon a prior note, made by and between the same parties, which bore date at Washington, D. C., April 5, 1888; was payable one year after date at a bank in Washington; bore the same rate of interest and was similarly indorsed. Some payments were made on account of the principal, but, before its maturity, the maker requested of plaintiff, a resident of Washington, by letter, to renew for the balance remaining due. Failing to receive any reply, he went on to Washington and there prevailed upon the plaintiff to agree to take a new note for his debt. This note was then drawn by the plaintiff and handed to the maker for execution, who took it back to his home in Syracuse, N. Y., where his and the appellant's signatures were affixed, as maker and indorser respectively. It had been agreed with the plaintiff that, upon this new note being returned to him, he would send back the original note, and the appellant himself mailed the renewal note to the plaintiff in Washington.

These facts, which were not disputed, should make it perfectly obvious that there was here every essential to a valid contract under the laws of the plaintiff's domicile, and the only accompaniment lacking to a full local coloring was the foreign place named for payment. For the affixing of the signatures to the note by the maker and the indorser, however important as acts, was yet but a detail in the performance and execution of the contract which had been agreed upon with the plaintiff. But naming a New York bank as the place where the maker would provide for the payment of the note did not characterize the contract in one way or the other. That arrangement was one simply for the convenience of the maker. It could have no peculiar effect. The transactions, which resulted in an agreement to extend the time for the payment of the debt and to accept a new note, took place wholly in the District of Columbia, and what else was enacted in the matter elsewhere neither added to nor altered the agreement of the parties. Though the engagement of the indorser, in a sense, was independent of that of the maker, that proposition is one which does not affect the local character of the contract, but which simply concerns the question of the

enforcement of the indorser's liability. Whatever the previous knowledge of the appellant, as to the negotiations and the agreement for a renewal of the promise to pay between the maker of the old note and the plaintiff, the question is without importance. When he indorsed the note, which had been prepared and was brought to him, and sent it through the mail to the plaintiff, his engagement was with respect to a contract validly made according to the laws of the District of Columbia, and when the note was received by the plaintiff the transaction was then consummated in that place. In *Lee v. Selleck*, 33 N. Y. 615, it was said, with respect to an indorsement in Illinois of a note made in New York, that the fact of the indorser writing his name elsewhere was of no moment. Upon delivery by his agent to the plaintiffs in New York, it became operative as a mutual contract.

The agreement, which was made in Washington for the giving of the promissory note in question, was the forbearance of a debt already due, upon which the appellant was liable; and the renewal of his engagement as indorser upon the note, without any qualification of his contract of indorsement, was in fact an act in ratification and execution of the previous agreement. That agreement between the plaintiff and the maker in Washington took its concrete legal form in a note, prepared there by the plaintiff, with a rate of interest sanctioned by the laws of his domicile, adopted by the appellant by indorsement in blank, and made operative as a mutual contract by delivery to plaintiff in Washington through the mails.

For the court to hold, because the note was not actually signed and indorsed in the District of Columbia, where the agreement, it evidenced, was made, or because it was made payable in another State, that the contract was void as contravening the usury laws of the place of signature and of payment, would be intolerable and against decisions of this court. *Wayne Co. Sav. Bank v. Low*, 81 N. Y. 566; *Western T. & C. Co. v. Kilderhouse*, 87 N. Y. 430; *Sheldon v. Haxtun*, 91 N. Y. 124.

I think the plaintiff was entitled to recover, as upon a contract made under the government of the laws of the District of Columbia, and, therefore, valid and enforceable in any State.

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

¹ *Acc. Findlay v. Hall*, 12 Oh. S. 610. See *Bascom v. Zediker*, 48 Neb. 380, 67 N. W. 148; *Rowland v. B. & L. Ass.*, 115 N. C. 825, 18 S. E. 965; *Mills v. Wilson*, 88 Pa. 118.

In an ordinary case, where a note is sent by mail by the maker to the payee, the contract is made at the place of mailing. *William Glenny Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711; *Barret v. Dodge*, 16 R. I. 740, 19 Atl. 530.

A contract to guaranty a debt is made where the debt is created. *Alexandria, A. & F. S. R. R. v. Johnson*, 61 Kan. 417, 59 Pac. 1063; *Milliken v. Pratt*, 125 Mass. 374, *supra*, p. 11; *John A. Tolman Co. v. Reed*, 115 Mich. 71, 72 N. W. 1104; and see *S. v. Williams*, 46 La. Ann. 922, 15 So. 290. — Ed.

MACK v. LEE.

SUPREME COURT OF RHODE ISLAND. 1881.

[Reported 13 Rhode Island, 293.]

DURFEE, C. J. This is assumpsit to recover \$312.50 for five barrels of whiskey sold by the plaintiff, a trader in New York, to the defendant, a retail dealer in Woonsocket, in this State. The sale was made in pursuance of an order addressed by the defendant to the plaintiff in New York for the whiskey to be sent to the defendant by the Stonington Line on three months' credit. The whiskey was delivered in New York for transportation by the Stonington Line to the defendant in Woonsocket, he paying the freight. It appeared, on cross-examination of the plaintiff's witnesses, that the order for the whiskey was obtained by one Levy, a travelling agent for the plaintiff, who visited the defendant at his place of business in Woonsocket, having samples of liquors with him, and there solicited the order. There was also some evidence that Levy offered to sell the whiskey to the defendant, at Woonsocket, though the plaintiff and Levy also testified that Levy had no authority to negotiate sales for the plaintiff, but only to obtain orders, which the defendant would fill or not, according to his own judgment. After the introduction of the plaintiff's testimony, the defendant moved that the plaintiff be nonsuited, on the ground that an offer in Rhode Island to sell the whiskey was in violation of Pub. Laws R. I. cap. 508, § 18, of June 25, 1875, and that therefore under § 44 of this chapter the plaintiff could not recover. The court granted the motion. The plaintiff excepted and petitions for a new trial for error in the ruling.

We think the court erred. The sale was consummated in New York when the plaintiff delivered the whiskey there to the Stonington Line in execution of the defendant's order. *Schlesinger & Blumenthal v. Stratton*, 9 R. I. 578. The sale therefore, independently of Levy's offer, if he made any offer, was clearly valid. In what way did Levy's offer, if he made any offer, make it invalid? If the offer was an offer to sell in New York, it was not a violation of cap. 508, § 18, for § 18 only prohibits an offer to sell by sample or otherwise when it is an offer to sell "in violation of the preceding sections;" *i. e.*, when it is an offer to sell in Rhode Island. But if the offer was an offer to sell in Rhode Island, then the offer was neither accepted by the defendant nor carried out by the plaintiff, for the order given by the defendant and executed by the plaintiff was an order for whiskey to be sold and delivered in New York, and we do not see, therefore, how the offer, though in itself it may have been criminal, can be held to have infected the sale with criminality or to have prejudiced the plaintiff's right to recover on it.

*Exceptions sustained.*¹

¹ *Acc. Atlantic Phosphate Co. v. Ely*, 82 Ga. 438; *S. v. Colby*, 92 Ia. 463, 61 N. W. 187; *Claffin v. Mayer*, 41 La. Ann. 1048; *Boothby v. Plaisted*, 51 N. H. 436. See *Rindskopf v. DeRuyter*, 39 Mich. 1. — ED.

PERRY v. MOUNT HOPE IRON COMPANY.

SUPREME COURT OF RHODE ISLAND. 1886.

[Reported 15 *Rhode Island*, 380.]

DURFEE, C. J.¹ This is an action to recover damages of the defendant corporation for refusing to receive a cargo of "bolt and nut scrap and boiler-plate" iron, so called, which the plaintiff claims the defendant agreed to buy at the rate of 87½ cents per hundred, delivered at its works in Somerset, Mass. Upon trial in the Court of Common Pleas, the jury found a verdict for the plaintiff. The case is before us on the defendant's petition for a new trial for alleged misrulings, and on the ground that the verdict was against the evidence and the weight thereof. The plaintiff lives and does business in Providence. The defendant is a Massachusetts corporation, having its business establishment in Somerset, Mass. Job M. Leonard is treasurer, and has an office in Boston. He makes purchases for the defendant. On the trial in the court below, the plaintiff put in testimony to show that his agent visited Leonard April 30, 1885, and informed him that the plaintiff had the "nut and bolt shop scrap," and solicited an offer for it; that Leonard offered 87½ cents per hundred, delivered at the company's wharf, and the agent asked him to let the offer stand until the next day, which Leonard agreed to do; and that the next day the plaintiff telegraphed from Providence to Leonard in Boston, accepting the offer. The defendant did not admit that the offer was made as stated, and made the point that, if it was so made, the contract was not completed by the acceptance until the acceptance reached him in Boston, and that consequently the alleged contract was a Massachusetts contract, and, not being in writing, was invalid under the Massachusetts Statute of Frauds, which was put in proof. The court below ruled the point against the defendant, holding that the contract was completed in Rhode Island by sending the telegram. The defendant cites a few cases which support its position. *McCullough v. Eagle Insurance Co.*, 1 Pick. 278; *British and American Telegraph Co. v. Colson*, L. R. 6 Exch. 108; *Langdell's Cases on Contracts*, §§ 1-18; *Langdell's Summary of Contracts*, §§ 14-16. But the weight of authority strongly supports the instruction given by the court. 1 *Addison on Contracts*, *18, note 1, and cases there cited; *Maclay v. Harvey*, 32 Am. Rep. note on p. 40. This note contains a full report of the recent English case, *Household Fire and Carriage Accident Insurance Co. v. Grant*, L. R. 4 Exch. Div. 216. The case was decided in the Court of Appeal July 1, 1879, by Thessiger and Bagallay, L.JJ., Bramwell, L. J., dissenting. Its doctrine is, that the contract is binding on the proposer as soon as a letter accepting the proposal, properly directed to him, is

¹ Part of the opinion is omitted. — Ed.

posted by the recipient, whether it reaches the proposer or not, if posted without unreasonable delay, and the post is the ordinary and natural mode of transmitting the acceptance. In that case the letter did not reach the proposer, and Bramwell, L. J., who dissented, conceded that, "where a posted letter arrives, the contract is complete on posting." In the case at bar the arrival of the telegram is not disputed. We are of opinion that the contract, if made, was completed in Rhode Island and is a Rhode Island contract, notwithstanding it was to be performed in Massachusetts. *Hunt v. Jones*, 12 R. I. 265. If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that, if it be shown that the acceptance duly reached the defendant, the question of the mode, no mode having been specified, is immaterial.¹

*Mass. on a bill N.Y. there
is to be in Mass. & in a letter
no acceptance by
not relied on by us
included in*

WORCESTER BANK v. WELLS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1844.

[Reported 8 Metcalf, 107.]

2. ASSUMPSIT on an alleged acceptance of a bill of exchange, and on an alleged promise to accept it. The bill declared on was this:—

"FARNUMSVILLE, March 3d, 1842.

"Six months after date, pay to the order of Peter Farnum, fifteen hundred dollars, value received, which place to account of

"Your obt. servts.

"FARNUM & WRIGHT.

"To Messrs. Wells & Spring, New York."

The parties submitted the case to the court, on the following agreed statement: On the 3d of March, 1842, and for some years previous thereto, Farnum & Wright, the drawers of the bill declared on, were manufacturers of cloth, at a place called Farnumsville, in Grafton, in this county. On that day, they forwarded thirty-eight bales of shirting to the defendants, commission merchants in the city of New York, to be sold by them for the benefit of the drawers. On the same day, said Farnum & Wright drew the bill declared on, and sent, per mail, an invoice of the goods, with notice of the said bill, to the defendants, who were domiciled in New York. On the same day, said Farnum & Wright offered the said bill, indorsed in blank by Peter Farnum, one of the drawers, at the banking-house of the plaintiffs, for discount, stating all the foregoing facts, and assuring the plaintiffs that the bill would

¹ *Acc. Garrettson v. North Atchison Bank*, 47 Fed. 867; *Tillinghast v. B. & P. R. Lumber Co.*, 39 S. C. 484, 18 S. E. 120. See 12 Clunet, 456 (Cass. Florence, 2 Feb. '83); 18 Clunet, 1026 (Cass. Turin, 13 Jan. '91.) — Ed.

be duly honored. They had previously, at sundry times, drawn bills on the defendants, which had been discounted by the plaintiffs under the same circumstances, which the defendants had accepted and paid. Whereupon the plaintiffs discounted the bill declared on, of which \$500 were paid to the drawers, and the balance was carried to their credit as a deposit. The next week, \$500 more were paid to the drawers, as part of their said deposit. The balance has never been paid nor demanded; the drawers becoming bankrupts soon after the second payment, to wit, on the 10th or 12th of said March. On the 16th of said March, the plaintiffs, not knowing of the writing or the existence of the letter of acceptance hereafter mentioned, indorsed the bill, by their cashier, and transmitted it to a bank in New York, and that bank caused said bill to be protested for non-acceptance, and, at the maturity thereof, caused it to be protested for non-payment.

On the 8th of March, 1842, the defendants wrote the following letter to the drawers:—

“NEW YORK, March 8th, 1842.

“Messrs. Farnum & Wright:

“Gentlemen: We have your two favors, 25th ult. and 3d inst., with invoice of 38 bales shirtings, which shall on arrival receive our best attention.” (Here were inserted remarks on the dull state and prospects of the market.) “As our market now stands, we should prefer not advancing over $4\frac{1}{2}$ cents on your shirtings. We hope to get, of course, much more than will cover this price; but we wish to feel ourselves secure under any state of things. Your draft for \$1,500 will be duly accepted; but in future shipments, please draw at the rate of $4\frac{1}{2}$ cents per yard. We will duly advise you, as we progress in sales.

Yours, etc.

WELLS & SPRING.”

This letter was mailed at Providence, R. I., and received by said drawers at Grafton, on the 10th or 11th of the same month, and was afterwards delivered by them to the plaintiffs, as evidence of the acceptance of said bill.

The following statutory provisions are in force in the State of New York: “No person within this State shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent. If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who on the faith thereof shall have received the bill for a valuable consideration.” 1 Rev. Sts. of New York, Part II. c. IV. Tit. II. §§ 6, 7.¹

WILDE, J. Upon the facts agreed, the general question is, whether there has been a valid acceptance of the bill declared on; and that depends on two other questions, which have been ably argued by the counsel. The first is, whether the contract of acceptance was made in this commonwealth, or in the State of New York. The second is,

¹ Arguments of counsel are omitted.—ED.

whether the validity of the contract of acceptance is to be determined by the law here, or by the law of New York.

The first question is, we think, settled by the principles laid down in *Carnegie v. Morrison*, 2 Met. 381. In that case, the defendants' agent in Boston contracted, in their behalf, with John Bradford, that they would accord a credit in his favor, on the usual terms and conditions, for the sum of £3,000 sterling. The letter of credit was forwarded to the plaintiffs, who were merchants in Gottenburg, requesting them to draw on the defendants, who were bankers in London, for that amount; which was accordingly done. That case, and another involving the same principles, were ably argued by counsel and fully considered by the court. It was decided that the letter of credit was a contract made in this State; and we consider that decision, and the principles laid down therein, as conclusive of the present question. If this case differs from that, the difference is more favorable to the defendants; for in that case the contract was to be performed in a foreign country, and in this, the defendants' contract was made and to be performed in New York. It was argued for the plaintiffs, that the defendants' letter, promising to accept the bill, was not a completion of the contract until it was received by the drawers, Farnum & Wright. But we do not so consider it. When the defendants agreed to their request, and put their letter in the mail, the contract, we think, was complete. If the defendants made any binding promise, it was made in New York, and to be performed there. A presentment of the bill for payment here would not have been a good presentment. If the validity of the contract is to be determined by the law of New York, it is clear that the defendants are not liable as acceptors. By the statute referred to, a promise to accept, in a letter, or on any other paper than the bill itself, is not an acceptance, where the party has not taken the bill on the faith of such promise. And it is agreed that this bill was discounted by the plaintiffs without any knowledge of the letter of acceptance.

The second question to be decided is, whether the validity of the contract is to be determined by the *lex loci* or the *lex fori*; and this question, we think, is clearly settled, although there have been conflicting decisions as to the revenue laws of a foreign State. But those decisions are distinguishable from cases of other contracts. They refer to contracts made in one country, to be executed in contravention of the revenue laws of a foreign State, and not to contracts made in a foreign State, to carry on smuggling against its laws. Judge Story is of opinion that contracts of the latter description would be void everywhere, and his opinion seems to us to be founded on well-established principles, and is only seemingly inconsistent with the doctrine that a court cannot take notice of the revenue laws of a foreign State. The cases in which this doctrine has been held were not founded on contracts made in contravention of its laws, and therefore are not inconsistent with the general principle, that a contract, void by the law of the place where it is made, is void everywhere. Judge Story remarks,

that this is as clearly settled as anything can be; and we think the remark is fully supported by the authorities and well-established principles. Story on Bills, § 137, and Conflict of Laws, § 242. In *Williams v. Wade*, 1 Met. 82, it was decided that a note made in Illinois and indorsed there, was a contract to be governed by the law of that State.

We are therefore of opinion that the defendants are not by law liable as acceptors; and it is quite certain that the plaintiffs cannot maintain their action on the defendant's promise to accept. That is a chose in action, not negotiable or assignable, so as to enable the assignees to maintain an action in their own names.

Plaintiffs nonsuit.

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Mass. A wouldn't; so
also in Mass. A later ratified in N.H.
HILL v. CHASE. receipt
Hill, N. J. formed
SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886. being lat*

[Reported 143 Massachusetts, 129.]

MORTON, C. J. The only question presented by this bill of exceptions is whether the presiding justice of the Superior Court, who tried the case without a jury, was justified in finding that the contract sued on was made in this State.

It appeared in evidence that the defendant, a married woman living in Salem in the State of New Hampshire, in the summer of the year 1864, employed her sister, Mrs. Shirley, to borrow for her fifty dollars of Mr. Hill, her brother, living in Salem in the State of Massachusetts. Mr. Hill declined to lend the money, but the plaintiff, his wife, out of her own money, delivered to Mrs. Shirley fifty dollars, together with a paper, of which the following is a copy:

"Salem, July 1, 1864. Borrowed and received from Nancy D. Hill the sum of fifty dollars.

"Sign this and return it."

Mrs. Shirley carried the money and paper to the defendant, who took and kept the money, signed the paper, knowing its contents, and returned it to the plaintiff at Salem in this State.

The presiding justice was justified in finding that, according to the understanding and purpose of the parties, the plaintiff lent to the defendant, through her agent, Mrs. Shirley, the sum of fifty dollars at Salem in Massachusetts; and that the defendant ratified the acts of her agent. There is no evidence which shows that the plaintiff employed Mrs. Shirley as her agent to lend money for her in New Hampshire. The justifiable inference from all the evidence is, that the parties intended that the transaction should be in form, what it was in substance, a loan by the plaintiff to the defendant, the plaintiff assuming, what the evidence shows to have been true, that the defendant had no choice as to the person of whom she borrowed, and that she would ratify the act of her agent.

This being so, the fact that the paper was signed in New Hampshire is immaterial. The contract of loan being made in this State, upon the condition that the paper should be signed and returned to the plaintiff in this State, the paper became operative as evidence of the contract when it was delivered to the plaintiff in this State. *Lawrence v. Bassett*, 5 Allen, 140; *Milliken v. Pratt*, 125 Mass. 374.

We are therefore of opinion, that the Superior Court was justified in refusing to rule that the contract sued on was made in New Hampshire, and in the finding that it was made and to be performed in Massachusetts, and therefore is to be governed by the laws of this State.

*Exceptions overruled.*¹

BERNHEIM v. RAAZ.

COURT OF CASSATION, TURIN. 1891.

[*Reported* 18 *Clunet*, 1026.]

THE defendant (the plaintiff in error), a merchant of Milan, ordered certain cloth by letter from the establishment of Raaz in Zullickau, Prussia. Raaz shipped the goods, but on arrival Bernheim refused to receive them.

Art. 321 of the German Handelsgesetzbuch provides: "A contract made between persons at a distance from each other is deemed complete from the moment when the acceptance of the offer is despatched to the other party."

Art. 36 of the Italian Code of Commerce decrees that: "A bilateral contract between persons absent from each other is complete only when the acceptance comes to the knowledge of the promisor, within the time fixed by him, or within the time ordinarily necessary for exchange of the offer and acceptance, taking into account the nature of the contract and the general usages of commerce."

THE COURT. The ground of error alleged by the plaintiff, that the Italian law was wrongly applied to a contract made at Zullickau, in conformity with the German Commercial Code there in force and applicable to the case, is not sound.

To determine the place where the contract became perfect by the meeting of the minds of the parties it is necessary, in view of the conflict between the Italian and German laws, to determine which of these was chosen by the parties as the law to regulate their agreement. The judgment below at once discards the German law, on the ground that it is to be presumed that the plaintiff, a resident of Milan and the offeror,

¹ *Acc. Van Reimsdyk v. Kane*, 1 Gall. 371, 377 (*semble*); *Dord v. Bonaffée*, 6 La. Ann. 563; and see *Golson v. Ebert*, 52 Mo. 260, 271.

In *Shuenfeldt v. Junkermann*, 20 Fed. 357, where the contract was void by the law of the place where the agent acted, but valid by the law of the place of ratification, it was held that the contract was made at the place of ratification. — Ed.

intended in the absence of evidence of a contrary intention, to act under his own national law; and that this was unreservedly accepted as the law to regulate the contract by the promisee, since he invokes it to demand the execution of the agreement. Now since it is necessary, by reason of the divergence between the national laws of the contracting parties, to refer to one law or the other to determine the juridical moment of forming the contract, it is quite clear that the solution of the question depends entirely upon the intention of the parties. To discover this, in default of express manifestation of it, one must depend on presumptions, the most legitimate of which is the adoption by the party who began negotiations of his own law, which was accepted by the contracting foreigner when he applied to it to obtain the performance of the contract.¹

SECTION II.

FORMALITIES.

CLEGG v. LEVY.

NISI PRIUS. 1812.

[Reported 3 Campbell, 166.]

To an action for goods sold and delivered, the principal defence set up was a partnership between the plaintiff and defendant in respect to the goods in question. To prove this, an unstamped agreement was put in, which had been signed by the parties at Surinam. The witness who proved the plaintiff's signature to it, had resided as a merchant in Surinam, and stated that in that colony all agreements must be stamped to be of any validity, and that there is a written law of the colony to this effect.

LORD ELLENBOROUGH. I should clearly hold, that if a stamp was necessary to render this agreement valid in Surinam, it cannot be received in evidence without that stamp here. A contract must be available by the law of the place where it is entered into, or it is void all the world over. But I must have more distinct evidence of the law of Surinam upon this subject than the parol examination of a merchant. The law being in writing, an authenticated copy of it ought to be produced. Although this gentleman supposes that it applies to all agreements, it may possibly contain an exception, like our own stamp act, as to agreements for the sale of goods, wares, and merchandises. In the case of *Bohtlingk v. Inglis*, 3 East, 381, and see 1 East, 515, respecting the right to stop *in transitu* in Russia, Lord Kenyon required the

¹ See 22 Clunet, 141 (Colmar, 19 May, 1893). — Ed.

written law of Russia upon this subject to be given in evidence. I will therefore admit this agreement to be read, unless you prove in the same way that by the law of Surinam a stamp was necessary to give it validity.

The agreement was read accordingly, but did not apply to the goods in question; and the plaintiff had a verdict.¹

*Q., payable in Mo.
promised to accept -
law, not by Mo.
bond, having*

SCUDDER v. UNION NATIONAL BANK.

SUPREME COURT OF THE UNITED STATES. 1875.

[Reported 91 *United States*, 406.]

HUNT, J.² Upon the merits, the case is this: The plaintiff below sought to recover from the firm of Henry Ames & Co., of St. Louis, Mo., the amount of a bill of exchange, of which the following is a copy, viz.: —

“CHICAGO, July 7, 1871.

“\$8,125.00.

“Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge to account of

“LELAND & HARBACH.

“To Messrs. Henry Ames & Co., St. Louis, Mo.”

By the direction of Ames & Co., Leland & Harbach had bought for them, and on the seventh day of July, 1871, shipped to them at St. Louis, five hundred barrels of pork, and gave their check on the Union Bank to Hancock, the seller of the same, for \$8,000.

Leland & Harbach then drew the bill in question, and sent the same by their clerk to the Union Bank (the plaintiff below) to be placed to their credit. The bank declined to receive the bill, unless accompanied by the bill of lading or other security. The clerk returned, and reported accordingly to Leland & Harbach. One of the firm then directed the clerk to return to the bank, and say that Mr. Scudder, one of the firm of Ames & Co. (the drawees), was then in Chicago, and had authorized the drawing of the draft; that it was drawn against five hundred barrels of pork that day bought by Leland & Harbach for them,

¹ If the law of the place of contracting makes an unstamped agreement void, suit cannot be brought upon it in any jurisdiction. *Alves v. Hodgson*, 7 T. R. 241; *Satterthwaite v. Doughty*, Busbee, 314; *Fant v. Miller*, 17 Gratt. 47 (*semble*). But if the agreement by the law of the place of contracting cannot be received in evidence, but is otherwise valid, suit may be brought upon it elsewhere. *Bristow v. Sequeville*, 5 Ex. 275; *Fant v. Miller*, 17 Gratt. 47; *Rennels v. Dearsley*, Pasie. Belge, 1877, 2, 146. The requirement of registration at the place of contracting is treated in the same way. *Ex parte Melbourne*, L. R. 6 Ch. 64. See *Guepratte v. Young*, 4 De G. & Sm. 217. — Ed.

² Part of the opinion only is given. — Ed.

and duly shipped to them. The clerk returned to the bank, and made this statement to its vice-president; who thereupon, on the faith of the statement that the bill was authorized by the defendants, discounted the same, and the proceeds were placed to the credit of Leland & Harbach. Out of the proceeds the check given to Hancock for the pork was paid by the bank.

The direction to inform the bank that Mr. Scudder was in Chicago and had authorized the drawing of the draft was made in the presence and in the hearing of Scudder, and without objection by him.

The point was raised in various forms upon the admission of evidence, and by the charge of the judge, whether, upon this state of facts, the firm of Ames & Co., the defendants, were liable to the bank for the amount of the bill. The jury, under the charge of the judge, held them to be liable; and it is from the judgment entered upon that verdict that the present writ of error is brought.

The question is discussed in the appellant's brief, and properly, as if the direction to the clerk had been given by Scudder in person. The jury were authorized to consider the direction in his name, in his presence and hearing, without objection by him, as made by himself.

The objection relied on is, that the transaction amounted at most to a parol promise to accept a bill of exchange then in existence. It is insisted that such a promise does not bind the defendants.

The suit to recover upon the alleged acceptance, or upon the refusal to accept, being in the State of Illinois, and the contract having been made in that State, the judgment is to be given according to the law of that State. The law of the expected place of performance, should there be a difference, yields to the *lex fori* and the *lex loci contractus*.

In Wharton on Conflict of Laws, § 401 *p*, the rule is thus laid down:—

“Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law.”

Miller *v.* Tiffany, 1 Wall. 310; Chapman *v.* Robertson, 6 Paige, 634; Andrews *v.* Pond, 13 Pet. 78; Lamesse *v.* Baker, 3 Wheat. 147; Adams *v.* Robertson, 37 Ill. 59; Ferguson *v.* Fuffe, 8 C. & F. 121; Bain *v.* Whitehaven and Furness Junction Ry. Co., 3 H. L. Cas. 1; Scott *v.* Pilkinton, 15 Abb. Pr. 280; Story, Conf. Laws, 203; 10 Wheat. 383.

The rule is often laid down, that the law of the place of performance governs the contract.

Mr. Parsons, in his “Treatise on Notes and Bills,” uses this language: “If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated.” P. 324.

For the purposes of payment, and the incidents of payment, this is

a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance.

The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (*Young v. Harris*, 14 B. Mon. 556; *Parry v. Ainsworth*, 22 Barb. 118), are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill.

The same author, however, lays down the rule, that the place of making the contract governs as to the formalities necessary to the validity of the contract. P. 317. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. *Dacosta v. Hatch*, 4 Zab. 319.

So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. *Aymar v. Shelden*, 12 Wend. 439.

So if a note, payable in New York, be given in the State of Illinois for money there lent, reserving ten per cent interest, which is legal in that State, the note is valid, although but seven per cent interest is allowed by the laws of the former State. *Miller v. Tiffany*, 1 Wall. 310; *Depeau v. Humphry*, 20 Mart. 1; *Chapman v. Robertson*, 6 Paige, 634; *Andrews v. Pond*, 13 Pet. 65.

Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

A careful examination of the well-considered decisions of this country and of England will sustain these positions.

There is no statute of the State of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange: on the contrary, a parol acceptance and a parol promise to accept are valid in that State, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the

bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance. *Nelson v. First Nat. Bank*, 48 Ill. 39; *Mason v. Dousay*, 35 Ill. 424; *Jones v. Bank*, 34 Ill. 319.

Unless forbidden by statute, it is the rule of law generally, that a promise to accept an existing bill is an acceptance thereof, whether the promise be in writing or by parol. *Wynne v. Raikes*, 5 East, 514; *Bank of Ireland v. Archer*, 11 M. & W. 383; *How v. Loring*, 24 Pick. 254; *Ward v. Allen*, 2 Met. 53; *Bank v. Woodruff*, 34 Vt. 92; *Spalding v. Andrews*, 12 Wright, 411; *Williams v. Winans*, 2 Green (N. J.), 309; *Storer v. Logan*, 9 Mass. 56; *Byles on Bills*, § 149; *Barney v. Withington*, 37 N. Y. 112. See the Illinois cases cited, *supra*...

These principles settle the present case against the appellants.

It certainly does not aid their case, that after assuring the bank, through the message of Leland & Harbach, that the draft was drawn against produce that day shipped to the drawees, and that it was drawn by the authority of the firm (while, in fact, the produce was shipped to and received and sold by them), and that the bank in reliance upon this assurance discounted the bill, Mr. Scudder should at once have telegraphed his firm in St. Louis to delay payment of the draft, and, by a subsequent telegram, should have directed them not to pay it.

*The judgment must be affirmed.*¹

K made in R.I..p
Bad under N.Y. § 5/F
Held: R.I. law

HUNT v. JONES.

SUPREME COURT OF RHODE ISLAND. 1879.

[Reported 12 *Rhode Island*, 265.]

DURFEE, C. J. This is assumpsit for damages for breach of contract. On trial to the jury the plaintiff submitted testimony to show that on 20th of July, 1876, at Providence, in Rhode Island, he sold to the defendant, or entered into an oral agreement with the defendant to sell him, two hundred barrels of Canaan lime at \$1.60 per barrel, to be delivered at the foot of Spring Street in the city of New York, the lime then being in process of manufacture in Canaan, Conn., and that subsequently, in pursuance of the contract, the lime was shipped to and delivered at the foot of Spring Street in New York City, and notice given of its delivery to the defendant, but that the defendant refused to accept it. The lime was afterwards sold at a loss and this action brought to recover damages.

¹ *Acc. Matthews v. Murchison*, 17 Fed. 760; *Mason v. Dousay*, 35 Ill. 424. — ED.

The defendant submitted in evidence a statute of the State of New York, which provides that "every contract for the sale of any goods, chattels, or thing in action, for the price of fifty dollars or more, shall be void, unless a note or memorandum of such contract be in writing and be subscribed by the parties to be charged thereby, or unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action, or unless the buyer shall at the time pay some part of the purchase-money."

The defendant thereupon requested the court to charge the jury, that as the contract was to be performed in the State of New York, its validity and construction were to be judged by the law of the place of performance, to wit, New York, and that therefore, the contract being void in New York, the plaintiff could not recover. The court refused to charge as requested, but did charge that the plaintiff could recover upon the contract, if otherwise entitled, notwithstanding the contract was not in writing, the contract being valid in Rhode Island, the place where it was made. To this charge the defendant excepted, and now petitions for a new trial, the jury having returned a verdict against him.

The case presents the question whether the validity of a contract, in respect of the form or mode of contracting, depends on the law of the place where it is made or on the law of the place where it is to be performed; or, indeed, whether the contract, if it conforms to either law, may not be enforced. No question is made but that the contract in suit is valid in Rhode Island, if resort may be had to the law of Rhode Island to determine its validity.

There is some conflict and confusion of authority on the question, but in the recent decision of *Scudder v. Union National Bank*, 1 Otto, 406, Mr. Justice Hunt, in delivering the unanimous judgment of the Supreme Court of the United States, holds the following language, to wit: "Matters bearing upon the execution, the interpretation, and the *validity* of a contract, are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought." Accordingly, in *Scudder v. Union National Bank* the court held that a bill of exchange drawn in Illinois upon a firm in Missouri, and orally accepted in Illinois, where such an acceptance is valid, was binding upon the drawees, though an acceptance in Missouri would not have been binding unless made in writing.

Where a contract is entered into in one State to be performed in another, there are, it has been said, two *loci contractus*, the *locus celebrati contractus* and the *locus solutionis*; and the law of the former governs the interpretation, nature, and validity of the contract, that of the latter its performance. A contract, however, may be valid by the law of both places, and yet fail practically, if the *lex fori* does not permit its enforcement. *Leroux v. Brown*, 12 C. B. 801.

The rule thus laid down, considered as a rule for personal contracts, though it is at variance with many *dicta* and decisions, is well supported on authority. *Dacosta v. Davis*, 24 N. J. Law, 319; *Cooper v. Waldegrave*, 2 Beav. 282; *Vidal v. Thompson*, 11 Mart. La. 23; *Aymar v. Sheldon*, 12 Wend. 439; *Chapman v. Robertson*, 6 Paige, 627, 634; *Bain v. Whitehaven, &c. Railway Co.*, 3 H. L. 1; *Van Reimsdyk v. Kane*, 1 Gall. 371; *Wharton, Conflict of Laws*, § 401, p. 676; *Story, Conflict of Laws*, § 234, *seq.*

There are cases which go farther and hold that a contract made in good faith in one State to be performed in another, will be upheld if it conforms to the law of either State. In making such contracts, it is argued, the parties may have in view either the law of the State where the contract is made or the law of the State where it is to be performed; and therefore the contract, if made in good faith without any design to evade the law, ought to be allowed and enforced according to its presumable intent, *ut res magis valeat quam pereat*. This rule has been applied especially to stipulations for interest on contracts for the payment of money, and is commended by Professor Parsons as reasonable and just. *Fisher v. Otis*, 3 Chand. 83; *Depeau v. Humphreys*, 8 Mart. n. s. La. 1; *Cromwell v. County of Sac*, 6 Otto, 51; *Bolton v. Street*, 3 Cold. 31; 2 *Parsons, Contracts*, 583; *Wharton, Conflict of Laws*, § 507.

The case at bar, however, involves the validity of the contract in matter of form rather than of substance, and seems to fall more appropriately under the former rule than the latter; but it is immaterial whether the former or the latter is applied, for the contract in suit is valid under either of them.

We think the charge of the court should be sustained and a new trial denied.

*Petition dismissed.*¹

¹ *Acc. Hubbard v. Exchange Bank*, 72 Fed. 234; *Park Brothers & Co. v. Kelly Axe Mfg. Co.*, 49 Fed. 618; *Houghtaling v. Bell*, 19 Mo. 84; *Dacosta v. Davis*, 4 Zab. 319; 7 *Clunet*, 480 (French Cass. 24 Aug. '80). So of a contract for the sale of real estate, valid where made. *Wolf v. Burke*, 18 Col. 264, 32 Pac. 427; *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111.

Conversely, if the statute of frauds at the place of contracting deprives the contract of validity, it cannot be enforced in another State. *Denny v. Williams*, 5 All. 1; *Allshouse v. Ramsay*, 6 Whart. 331.

On the other hand, if the statute of frauds of the forum goes to the remedy, it will be applied to contracts made elsewhere and valid where made. *Leroux v. Brown*, 12 C. B. 801; *Heaton v. Eldridge*, 56 Oh. S. 87, 46 N. E. 638. — Ed.

*Mo. to accept bill in
Mo. law, good by Ill.
law of place of pay.* HALL v. CORDELL.
20.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 142 *United States*, 116.]

THE case was stated by the court as follows:—

This was an action of assumpsit: It was based upon an alleged verbal agreement made on or about April 1, 1886, at Marshall, Missouri, between the defendants in error, plaintiffs below, doing business at that place as bankers, under the name of Cordell & Dunnica, and the plaintiffs in error, doing business at the Union Stock Yards, Chicago, Illinois, under the name of Hall Bros. & Co. There was a verdict and judgment in favor of the plaintiffs for \$5,785.79.

The alleged agreement was in substance that Hall Bros. & Co. would accept and pay, or pay on presentation, all drafts made upon them by one George Farlow, in favor of Cordell & Dunnica, for the cost of any live stock bought by Farlow and shipped by him from Missouri to Hall Bros. & Co. at the Union Stock Yards at Chicago.

There was proof before the jury tending to show that, on or about July 13, 1886, Farlow shipped from Missouri nine car-loads of cattle and one car-load of hogs, consigned to Hall Bros. & Co. at the Union Stock Yards, Chicago; that such cattle and hogs were received by the consignees, and by them were sold for account of Farlow; that out of the proceeds they retained the amount of the freight on the shipment, the expenses of feeding the stock on the way and at the stock yards, the charges at the yards and of the persons who came to Chicago with the stock, the commissions of the consignees on the sale, the amount Farlow owed them for moneys paid on other drafts over and above the net proceeds of live stock received and sold for him on the market, and two thousand dollars due from Farlow to Hall Bros. & Co. on certain past-due promissory notes given for money loaned to him; that at the time of the above shipment Farlow, at Marshall, Missouri, the place of agreement, made his draft, of date July 13, 1886, upon Hall Bros. & Co., at the Union Stock Yards, Chicago, in favor of Cordell & Dunnica for \$11,274, the draft stating that it was for the nine car-loads of cattle and one car-load of hogs; that this draft was discounted by Cordell & Dunnica, and the proceeds placed to Farlow's credit on their books: that the proceeds were paid out by the plaintiffs on his checks in favor of the parties from whom he purchased the stock mentioned in the draft, and for the expenses incurred in the shipment; that the draft covered only the cost of the stock to Farlow; that upon its presentation to Hall Bros. & Co. they refused to pay it, and the same was protested for non-payment; and that, subsequently, Cordell & Dunnica received from Hall Bros. & Co. only the sum of \$5,936.55, the balance of the proceeds of the sale of the above cattle and hogs, consigned to them as stated, after deducting the amounts

retained by the consignees, out of such proceeds, on the several accounts above mentioned.

The contract sued upon, having been made in Missouri, the defendant contended that it was invalid under the statutes of that State, which are cited in the opinion of the court, *infra*, and could not be made the basis for a recovery in Illinois. This contention being overruled, the defendant excepted, and (judgment having been given for the plaintiff) sued out this writ of error.¹

HARLAN, J. Our examination must be restricted to the questions of law involved in the rulings of the court below. And the only one which, in our judgment, it is necessary to notice is that arising upon the instructions asked by the defendant, and which the court refused to give, to the effect that the agreement in question, having been made in Missouri, and not having been reduced to writing, was invalid under the statutes of that State, and could not be recognized in Illinois as the basis of an action there against the defendants. . . .

The contention of the plaintiffs in error is that the rights of the parties are to be determined by the law of the place where the alleged agreement was made. If this be so, it may be that the judgment could not be sustained; for the statute of Missouri expressly declares that no person, within that State, shall be charged as an acceptor of a bill of exchange, unless his acceptance be in writing. And the statute, as construed by the highest court of Missouri, equally embraces, within its inhibitions, an action upon a parol promise to accept a bill, except as provided in section 537. *Flato v. Mulhall*, 72 Mo. 522, 526; *Rousch v. Duff*, 35 Mo. 312, 314. But if the law of Missouri governs, this action could not be maintained under that section; because, as held in *Flato v. Mulhall*, above cited, the plaintiffs, being the payees in the bill drawn by Farlow upon Hall Bros. & Co., could not, within the meaning of the statute, be said to have "negotiated" it. The Missouri statute is a copy of a New York statute, in respect to which Judge Duer, in *Blakeston v. Dudley*, 5 Duer, 373, 377, said: "We think, that to negotiate a bill can only mean to transfer it for value, and that it is a solecism to say that a bill has been negotiated by a payee, who has never parted with its ownership or possession. The fact that the plaintiffs had given value for the bill when they received it, only proves its negotiation by the drawer — its negotiation to, and not by them. . . . Their putting their names upon the back of the bill was not an indorsement, but a mere authority to the agent whom they employed, to demand its acceptance and payment. The manifest intention of the legislature in § 10 [similar to § 537 of the Missouri statutes] was to create an exception in favor of those who, having transferred a bill for value, on the faith of the promise of the drawee to accept it, have, in consequence of his refusal to accept, been rendered liable and been subjected to damages, as drawers or indorsers." The plaintiffs in error, therefore, cannot rest their case upon section 537.

¹ Arguments of counsel and part of the opinion are omitted. — Ed.

We are, however, of opinion that, upon principle and authority, the rights of the parties are not to be determined by the law of Missouri. The statute of that State can have no application to an action brought to charge a person in Illinois, upon a parol promise, to accept and pay a bill of exchange payable in Illinois. The agreement to accept and pay, or to pay upon presentation, was to be entirely performed in Illinois, which was the State of the residence and place of business of the defendants. They were not bound to accept or pay elsewhere than at the place to which, by the terms of the agreement, the stock was to be shipped. Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties. *Coghlan v. South Carolina Railroad Co.*, 142 U. S. 101, and the authorities there cited. In this connection it is well to state that in *New York & Virginia State Stock Bank v. Gibson*, 5 Duer, 574, 583, a case arising under the statute of New York, above referred to, the court said: "Those provisions manifestly embrace all bills, wherever drawn, that are to be accepted and paid within this State, and were the terms of the statute less explicit than they are, the general rule of law would lead us to the same conclusion: that the validity of a promise to accept a bill of exchange depends upon the law of the place where the bill is to be accepted and paid," citing *Boyce v. Edwards*, 4 Pet. 111.

Looking, then, at the law of Illinois, there is no difficulty in holding that the defendants were liable for a breach of their parol agreement, made in Missouri, to accept and pay, or to pay upon presentation, in Illinois, the bills drawn by Farlow, pursuant to that agreement, in favor of the plaintiffs. It was held in *Scudder v. Union National Bank*, 91 U. S. 406, 413, that, in Illinois, a parol acceptance of, or a parol promise to accept, upon a sufficient consideration, a bill of exchange, was binding on the acceptor. *Mason v. Donsay*, 35 Ill. 424, 433; *Nelson v. First Nat. Bank of Chicago*, 48 Ill. 36, 40; *Sturgis v. Fourth National Bank of Chicago*, 75 Ill. 595; *St. Louis National Stock Yards v. O'Reilly*, 85 Ill. 546, 551.

The views we have expressed were substantially those upon which the court below proceeded in its refusal of the defendants' requests for instructions, as well as in its charge to the jury. The suggestion that there was a material variance between the averments of the original and amended declaration, and the proof adduced by the plaintiffs, is without foundation. The real issue was fairly submitted to the jury, and their verdict must stand.

Judgment affirmed.

MR. JUSTICE GRAY was not present at the argument and did not participate in the decision.¹

¹ *Acc. Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959. — Ed.

VALERY v. SCOTT.

COURT OF SESSION, SCOTLAND. 1876.

[Reported 3 Court of Sessions Cases, 4th Series, 965.]

THIS was an action by Count Joseph Valery, partner of the firm of Valery Frères et Fils, shipowners, Marseilles and Paris, against John Scott, partner of the firm of Scott and Company, shipowners, Greenock, for payment of £4,864, and interest.

The pursuer averred: "On 28th July, 1870, the firm of Valery Frères et Fils, and the firm of Scott and Company, entered into and executed in duplicate in Paris a contract in the French language, whereby the firm of Scott and Company undertook to build for and supply to the firm of Valery Frères et Fils eight new iron screw packet boats." . . . (Cond. 3). "Simultaneously with entering into the said contract, the defender undertook and agreed to pay to the pursuer commission at the rate of two per cent upon the amount of the said contract, and at the same time with the execution of the said contract the defender wrote and signed and delivered to the pursuer a letter or obligation in the French language, of which the following is a copy and accurate translation: —

"PARIS, the 27 July, 1870.

"Monsieur Joseph Valery, — As has been agreed between us, I engage myself to give to you two per cent upon the amount of the contract for the eight new packet boats for which I have signed a contract to-day.

"Yours truly,

"JOHN SCOTT."

He averred that the contract was executed, and the price paid, and that the commission amounted to the sum concluded for.

In answer to Cond. 3 the defender stated: "The said letter is not duly stamped; and according to the law of France, where said letter was written and granted, it is essential that the said letter should be stamped in order to make it valid and binding as an obligation."

He pleaded: (1) The said letter falls to be considered and construed according to the law of France, where the same was made and granted, and by said law the said letter imposes no binding obligation upon the defender, but is null and void, in respect it is not duly stamped.

The Lord Ordinary pronounced this interlocutor: "Repels the first plea in law stated for the defender, and appoints the cause to be put to the roll for further procedure."

The defender reclaimed.¹

LORD PRESIDENT (INGLIS). I am of opinion that this is a Scotch contract. We have heard a great deal on the one side about the place of

¹ Arguments of counsel are omitted. — ED.

Handwritten note:
 It formed in
 Paris, unstamped
 as required by French
 law. John had formed
 Scotland. Held: S.

making a contract, and a great deal on the other of the place of performing a contract. These are both circumstances to be taken into consideration as regards the nationality of a contract, but the place of performance is generally of more importance than the place of making.

The place of the making of a contract is in many cases indifferent. Take the case of two Scotchmen meeting in Paris, who contract regarding the disposal of a movable in Scotland. It is of no consequence that they happen both to be in Paris. I merely put this as an example of how unimportant the place of making a contract often is. But the place of performance of a contract is never unimportant, for parties must always see that the law of the place where the contract is to be performed must affect them very much. Now, I think this is a Scotch contract to all intents and purposes. One of the contracting parties is a Frenchman, but that makes no difference; he might just as well have been a German. The party who undertakes the obligation, who is to perform the contract, is a Scotchman, whose place of business is in Scotland, and this obligation is in direct connection with another contract, viz., that of building the steamers, and the measure of liability under this contract can only be found by means of reference to that other. Now, that other contract is for building ships in Greenock; the domicile, the residence, and the place of business of Scott are all Scotch. No place is contemplated in the contract except Greenock.

A good deal of misunderstanding has arisen from the way in which writers have treated this subject. By the term *locus contractus* is sometimes understood the place of making the contract, *i. e.*, the place where it is actually made out and signed; but, in general, what is meant is the locality, as ascertained from the nature of the contract itself, and what is to be done under it. In this sense the civil law says, *contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit*; that means, that the place of the contract is the place of performance. No doubt there are cases where the place of contracting is of importance, but generally the place of performing is of more. Here there is no room for serious argument on that point. Nothing here is French except the fact that the contracting parties happened to be in Paris. Of course the idea of a Scotch contract requiring a French stamp to make it binding is out of the question, and so I think the judgment of the Lord Ordinary should be affirmed.¹

The court adhered.

¹ The remainder of the opinion, and concurring opinions of Lord DEAS and Lord MURE are omitted. — ED.

SECTION III.

OBLIGATION.

ROBINSON v. BLAND.

KING'S BENCH. 1760.

[Reported 2 Burrow, 1077.]

*Bill given in
in England. Paid
for gambling
Need: Money
had by law of
it recovers on
Caus.*

THIS was a case reserved at Nisi Prius at Westminster Hall, before Lord MANSFIELD, 22d May, 1760.

The action was an action upon the case upon several promises, and the declaration contained three counts. The first count was upon a bill of exchange, drawn at Paris by the intestate, Sir John Bland, on the 31st of August, 1755, and bearing that same date, on himself, in England, for the sum of £672 sterling, payable to the order of the plaintiff ten days after sight, value received and accepted by the said Sir John Bland. The second count was for £700, moneys lent and advanced by the said plaintiff to the said Sir John Bland, at his request. The third count was for £700, moneys had and received by the said Sir John Bland, to and for the use of the plaintiff. And the plaintiff's damage is laid at £800.

The defendant pleaded the general issue, "That Sir John Bland did not undertake and promise," etc., and issue was joined thereon.

The verdict was found for the plaintiff, and £672 given for damages, subject to the following case stated for the opinion of the court, on the following facts proved and admitted, viz. :

That the bill of exchange was given at Paris for £300 there lent by the plaintiff to Sir John Bland, at the time and place of play; and for £372 more lost at the same time and place, by Sir John Bland, to the plaintiff, at play.

That the play was very fair; and there is not any imputation whatsoever on the plaintiff's behavior.

That there were several gentlemen and persons of fashion then and there at play, besides the plaintiff and Sir John Bland.

That in France, money lost at play, between gentlemen, may be recovered, as a debt of honor, before the marshals of France, who can enforce obedience to their sentences by imprisonment; though such money is not recoverable in the ordinary course of justice.

That money lent to play with, or at the time and place of play, may be recovered there, as a debt, in the ordinary course of justice, there being no positive law against it.

That Sir John Bland was, and the plaintiff is, a gentleman.

The question was, Whether, under these circumstances, the plaintiff is entitled to recover anything, and what, against the defendant?

It was first argued on Tuesday, 17th June last, by Mr. Serj. *Hewitt* for the plaintiff, and Mr. *Blackstone* for the defendant; and again, yesterday and to-day, by Mr. *Wedderburn* for the plaintiff, and Mr. *Coxe* for the defendant.

Upon the conclusion of this second argument,

Lord MANSFIELD said, that in the present case, the facts stated scarce leave room for any question; because the law of France and of England is the same.

The first question is, Whether the plaintiff is entitled to recover upon this bill of exchange, by force of the writing.

The second question is, Whether he is entitled to recover upon the original consideration and contract, by the justice and equity of his case, exclusive of any assistance from the bill of exchange, and taking that to be a void security.

As to the first question, the defendant has objected: "That the consideration of the bill of exchange is wholly money won and lent at play. Therefore, by force of the writing, the plaintiff cannot by the law of England recover, such security being utterly void." And, no doubt, the law of England is so.

There are three reasons why the plaintiff cannot recover here, upon this bill of exchange.

First, The parties had a view to the laws of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. *Huberi Prælectiones*, lib. 1, tit. 3, p. 34, is clear and distinct: "*Veruntamen, etc. locus in quo contractus, etc. potius considerand', etc. se obligavit.*" Voet speaks to the same effect.

Now here, the payment is to be in England; it is an English security, and so intended by the parties.

Second reason: Mr. *Coxe* has argued very rightly: "That Sir John Bland could never be called upon abroad for payment of this bill, till there had been a wilful default of payment in England." The bill was drawn by Sir John Bland, on himself, in England, payable ten days after sight.

In every disposition or contract where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of lands, a mortgage, a contract concerning stocks, must be all sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here.

Third reason: The case don't leave room for a question. For the law of both countries is the same. The consideration of the bill of exchange might, in an action upon it, be gone into there as well as here. And as to the money won at play, it could not be recovered in any court of justice there, notwithstanding the bill of exchange.

This writing is, as a security, void (being for a gaming debt), both in France and in England. We may therefore lay the bill of exchange out of the case: it is very clear the plaintiff cannot recover upon that count.

Second question. Then as to the other counts, for money had and received to the plaintiff's use, and for money lent and advanced to him. — Consider it distinctly, as to each part: the money won, and the money lent.

First, As to the money won. By the rule of the law of England, no action can be maintained for it.

To this it has been objected, "That the contract was made in France. Therefore, *ex comitate*, the law of France must prevail, and be the rule of determination."

I admit, that there are many cases where the law of the place of the transaction shall be the rule; and the law of England is as liberal in this respect as other laws are. This is a large field, and not necessary now to be gone into.

It has been laid down at the bar, "That a marriage in a foreign country must be governed by the law of that country where the marriage was had;" which, in general, is true. But the marriages in Scotland, of persons going from hence for that purpose, were instanced by way of example. They may come under a very different consideration, according to the opinion of Huberus, p. 33, and other writers.

No such case has yet been litigated in England, except one, of a marriage at Ostend, which came before Lord Hardwicke, who ordered it to be tried in the Ecclesiastical Court; but the young man came of age, and the parties were married over again; and so the matter was never brought to a trial.

The point that the plaintiff must rest upon in the present case is this: "The money was won in France; therefore it ought to be governed by the law of France; and it is recoverable there before the marshals of France, who can enforce obedience to their sentence."

The Parliament of Paris would pay no regard to their judgment, nor carry it into execution. The marshals of France proceed personally against gentlemen, as to points of honor, with a view to prevent duelling.

They could not have taken cognizance of the present matter. It was not within their jurisdiction. It was no breach of honor in France, for the money was payable in England; and Sir John Bland could not be said to have forfeited his honor till the ten days were out, and till the money had been demanded in England, and payment refused there. Sir John Bland was actually dead in a very short time after he gave the note. The marshals of France can only proceed personally against the gentleman who loses the money, but have no power over his estate or representatives, after his death.

Therefore, as to the money won, the contract is to be considered as void by the law of France, as well as by the law of England; which

makes it unnecessary to consider "how far the law of France ought to be regarded."

Next, as to the money lent. The sense of the legislature seems to me to be agreeable to the cases that have been cited.

The act of 16 C. 2, c. 7, § 3, does not meddle with money lent at play. But, as to money (exceeding £100), lost, and not paid down at the time of losing it, it says, "That the loser shall not be compellable to make it good; but the contract and contracts for the same and for every part thereof, and all securities, shall be utterly void, etc." The words "contract and contracts for the same" are not in 9 Anne, and I dare say were designedly left out: it only says, "That all notes, bills, bonds, judgments, mortgages, or other securities, etc., for money won or lent at play, shall be utterly void," etc.

Here the money was fairly lent, without any imputation whatsoever. Sir John Bland, the borrower of it, being in a foreign country, might very naturally have been distressed, under his then situation amongst foreigners, for want of having ready money, or knowing how to procure it; and it might be even a kind and generous and commendable act to lend it to him at that time, to extricate him from his difficulties, as he was then circumstanced. The jury have left it quite open to the court to determine "whether anything, and what, is recoverable." As to the money won, we think it cannot be recovered; as to the money lent, the plaintiff is entitled to it, both by the law of England and by the law of France.

Interest will be payable upon this bill after the expiration of the ten days. The question will be, "How far the interest ought to be carried down." It is generally said, "to the day of the writ brought;" *i. e.* of commencing the action. But I do not see why it should not be carried further; it is equally reasonable, it is the right of the party, to have it to the last act of the court ascertaining the sum due.

I have long wished for an opportunity to have this point considered by the court; because I would not take it upon myself at *Nisi Prius*, to change what has commonly been the practice.

But, as to this last point, we will think of it for a day or two.

Mr. Justice DENISON gave no opinion now, on this last point. As to the rest, he said, it is a plain, clear, short case; it is determinable by the rules of the common law, and no other law.

The money is made payable in England. As it is a foreign bill of exchange, it must of course be dated abroad; but it is to be paid here at home. And the plaintiff has appealed to the laws of England by bringing his action here, and ought to be determined by them.

But, by the laws of England, the security is void; which might have been pleaded, as well as it might be given in evidence; and the defendant needed not, in his plea, to have said where it was won at play. And being a transitory action, it must then have been tried where the action was brought; and so it must have been, if the plea had been local. Indeed, in many cases that might be put, the determination

must have been according to the laws of the place where the fact arose. But the present case is not so; here, the security is void by the laws of the country where he brings his action upon it. And this security is one entire security both for the money won at play, and the money lent at play.

There is a distinction between the contract and the security. If part of the contract arises upon a good consideration, and part of it upon a bad one, it is divisible. But it is otherwise as to the security; that being entire, is bad for the whole.

Therefore the plaintiff ought to be barred of this action upon this bill of exchange, as being a void security by the laws of this country where he brings his action. But still the contract remains; and he has a right to maintain his action for so much of his demand as is legal, which is the money lent.

As to the time of carrying down the interest, it may be proper to consider of it a little while.

Mr. Justice WILMOT. Here are two sums demanded, which are blended together in one bill of exchange, but are divisible in their nature.

As to the money lent. The cases that have been cited are in point "that it is recoverable." But if there were none, yet I should be clear that the plaintiff may maintain an action for that.

As to contracts being good, and the security void: The contract may certainly be good, though the security be void; and I think that this contract is good, though the security is void, by the statute of 9 Anne. This is not stated to be money lent to play with, or for the purpose of play; but "lent at the time and place of play" only; nothing appears upon this case to induce any suspicion that it was lent for any bad purpose.

The statutes meant to prevent excessive gaming, and to vacate all securities whatsoever for money won at play; and the genuine, true, and sound construction of 9 Anne is to understand it as intended to prevent any securities being taken for money won at play, or lent to play with, when the borrower had lost all his ready cash; but not to make the contract itself void, where the money is fairly and *bona fide* lent, though at the time and place of play.

As to the interest that shall be given to the plaintiff upon the sum lent, in the assessment of the damages: This is an action that sounds in damages; and the true measure undoubtedly is the damage which the plaintiff sustains by the non-performance of the contract; and that damage is the whole interest due upon the sum lent; viz. from the time of its being payable, up to the time of signing the judgment. Nay, even then he may suffer; he may still be kept out of his money, by writ of error, for a still further time. According to my memory, Lord Coke's exposition of the statute is, that the "costs of the writ" shall extend to all the legal costs of the suit.

The present case, notwithstanding the questions that have been agi-

tated in arguing it, comes out to be no case at all, no point at all, no law at all.

Indeed, "Whether an action can be supported in England, on a contract which is void by the law of England, but valid by the law of the country where the matter was transacted," is a great question (though I should have no great doubt about that). But that case does not exist here: for it is not here stated, "that such a debt as this, for money won at play in France, is recoverable in the ordinary courts of justice there," but quite the contrary. So that the laws of France and of England are the same as to the money won: the contract is void as to that, by the laws of both countries.

And as to this wild, illegal, fantastical court of honor, the court of the marshals of France, acting only *in personam*, contrary to the universal and general laws even of the country where the transaction happened, and contrary to the genius and spirit of our own law too; it would be absurd to suppose that the bare possible accidental chance of a recovery in that court should be a foundation for maintaining an action here, upon a matter prohibited by the laws of both countries.

Besides, Sir John Bland himself, as it seems, was not, and the present defendant, the person now before this court, could never have been the object of the jurisdiction of that court. The remedy there, in its utmost extent, was only *in personam*; and this defendant is an administratrix only.

A strong reason for the plaintiff's recovering in this action the money lent is, that the bill of exchange is payable in England; and therefore it shall be determined according to the laws of England, where it is payable. As in the case of Sir John Champant v. *Ld. Ranelagh*, Mich. 1700, in Chancery (reported in *Precedents in Chancery*, 128). A bond was made in England, and sent over to Ireland, and the money to be paid there; but it was not mentioned what interest should be paid: my Lord Keeper was of opinion, "that it should carry Irish interest." Therefore, as this money was payable in England, the law of England must be the rule of recovering it.

I give no opinion as to the other point: yet I cannot help thinking, that where a person appeals to the law of England, he must take his remedy according to the law of England, to which he has appealed.

There is no difference, in this case, between the statute law and the common law of England; a contract cannot be maintained upon the one that is void by the other.

The law of the place where the thing happens does not always prevail. In many countries, a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose an action to be brought here, upon such a contract which arose in such a country: but that would never be allowed in this country. Therefore the *lex loci* cannot in all cases govern and direct.

The sentences of foreign courts have always some degree of regard paid to them by the courts of justice here; and it is very right that

an attention should be paid to them, as far as they ought to have weight in the case depending.

But if a man originally appeals to the law of England for redress, he must take his redress according to that law to which he has appealed for such redress. Therefore, if this rule of determination was different, by the law of France, from our rule here, yet I should incline, that the law of England, where the action was brought, should prevail against the law of France, if they did really clash with each other; because the party seeking redress has chosen to apply here. But I give no opinion at all on this point.

As to the money lent: There can be no doubt; because there is no law either in England or France that hinders the plaintiff from maintaining his action for it.

IN RE MISSOURI STEAMSHIP COMPANY. 6

CHANCERY DIVISION: COURT OF APPEAL. 1888: 1889. 7

[*Reported 42 Chancery Division, 321.*]

CHITTY, J. This is a claim by Mr. Munroe against the Missouri Steamship Company, Limited, for damages for loss of his cattle. Mr. Munroe is a citizen of the United States domiciled there. The company is an English company incorporated according to English law, domiciled in England, and now in voluntary liquidation. The contracts were made at Boston, Massachusetts, where the company had an agent by whom the contracts were entered into on their part. The ship on which the goods were to be carried was the Missouri, a British ship, and one of a line of steamships trading regularly between Boston and Liverpool. The contracts were for the carriage of the cattle from Boston to Liverpool, and they contained express stipulations exempting the shipowners from liability for loss or damage arising from negligence of the master or crew, and they provided that bills of lading should be given containing stipulations to the same effect. The company's agent had no authority to bind the company by any contract not containing such stipulations as those which were actually inserted. The cattle were shipped on board at Boston, and bills of lading were given and accepted there in conformity with the contracts. The ship sailed and was stranded on the Welsh coast. It is admitted for the purposes of the present case that the stranding occurred through the negligence of the master and crew. In these circumstances it is clear, as admitted by the claimant's counsel, that he is not entitled to recover if these stipulations, exempting the shipowners from liability arising from the negligence of their servants, are valid. But it is contended for the claimant that the stipulations are invalid according to the law

of the State of Massachusetts, where the contracts were in fact made and the bills of lading given and accepted.

There was no substantial contest before me as to the present state of the law in Massachusetts on the subject. According to that law the stipulations are invalid. The ground upon which the decision at present stands is that the stipulations by which a common carrier endeavors to exempt himself from the consequences of the negligence of himself and his servants are considered to be extorted by the carrier without any real assent on the part of the person sending the goods, and are void as being contrary to public policy. In the *Brentford City*, 29 Fed. Rep. 373, these principles were held to apply in favor of the shipper at Boston of cattle on board a British vessel for carriage to England, where the facts were substantially the same as those in the present case. The law in the United States on this subject, however, appears not to be finally settled. The question is apparently pending in the Supreme Court in the case of "*The Montana*" on appeal from the Circuit Court. The Supreme Court has given leave to the appellants to adduce evidence to show what is the English law on the subject. The arguments have been concluded and the judgment has been reserved. But as after inquiry I am unable to ascertain that some considerable time may not elapse before the judgment is given, and as it is not clear that the judgment will determine the point, I have not thought it right to postpone any longer my decision. Should the judgment of the Supreme Court be in favor of the shipowner on the validity of the stipulation, Mr. Munroe's claim must fail.

I proceed, then, to consider the question on the assumption that according to the law of Massachusetts the stipulations are void. The question to be determined is whether the law of England or the law of Massachusetts ought to be applied to the stipulations which purport to exempt the shipowners from liability for negligence.

For the claimant it is argued that the question, being a question as to the validity of the terms of the contracts, ought to be determined according to the law where the contracts were made. For the shipowners, on the other hand, it is argued that the question ought to be determined according to the law of the country to which the ship belongs. As the stipulations in the contracts and the bills of lading are identical there is no occasion to treat these documents separately.

Now the question does not relate to the formal validity of the contracts, and the question raised by the claimant does not go to the validity in matters of substance of the contract as a whole. So far as relates to all matters of form the contracts are valid according to the law of both countries. So far as relates to all matters of substance the rest of the contracts would, if the stipulations attached had not been inserted, stand valid according to the law of both countries. Further, the stipulations are not impeached on the ground that they are of a criminal or wicked or immoral nature, or such as ought not to be permitted according to the law of civilized countries; they are im-

peached solely on the ground that they are void, as being disallowed by the law of the place where the contracts were made, which law considers them contrary to its own views of the public policy that ought to prevail within the limits of its own territorial jurisdiction. Although the law of Massachusetts would in the case of a contract made in Massachusetts by a common carrier for the carriage of goods wholly within the territories of the State hold these stipulations void, I cannot find any sufficient reason for saying it would hold them void in the case of a contract made within the State for the carriage of goods where the performance of the contract was (as in the case before me) to take place mainly outside the State, if it were declared expressly on the face of the contract that for all purposes the contract was to be governed by the law of the country to which the ship belonged, and the law of such country allowed the stipulations to be valid. In other words, I apprehend that the law of Massachusetts would not prohibit the parties to such a contract from contracting expressly with a view to the law of England. See Lord Mansfield's judgment in *Robinson v. Bland*, 2 Burr. 1078, and Story's *Conflict of Laws*, pp. 280, 281.

The contracts before me do not contain any such express declaration. But I have examined and endeavored to ascertain the precise nature of the objections raised, with this result, as it appears to me, that it was within the competence of the parties according to the law of both countries to enter into the contracts.

Two cases of high authority were relied upon by the company's counsel in support of their contention: *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, and *Peninsular and Oriental Steam Navigation Company v. Shand*, 3 Moo. P. C. (N.S.) 272. The actual decisions in those cases may not precisely govern the present case, but the question is whether the principle upon which those decisions are based does not apply.

It is generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention.

Numerous instances of the exceptions are to be found in the books. A different intention, that is an intention to be bound by some other law than the law of the place where the contract is made, may be inferred from the subject-matter of the contract and from the surrounding circumstances, so far as they are relevant to determine the character of the contract. See the judgment of Mr. Justice Willes in *Lloyd v. Guibert*, Law Rep. 1 Q. B. 122, 123. The terms and stipulations found in the contract itself are matters of importance to be taken into consideration as to the true inference to be drawn. The general principle by which the Court of Exchequer was guided in the solution of the question as to what law ought to prevail was that the rights of the parties to a contract are to be judged of by that law

by which they intended, or rather by which they may justly be presumed to have intended, to bind themselves, and by the steady application of that principle the court arrived at the conclusion that where the contract of affreightment does not provide otherwise than as between the parties to such contract in respect of sea-damage and its incidents, the law of the ship should govern. In that case the ship was a French ship, the contract was made at a Danish West-Indian port, and the goods were shipped to Hayti to be delivered at Havre, London, or Liverpool, at the charterer's option. The court held that the law of France applied, whereby the shipowners on abandonment of the ship and freight were exempt from any liability to the owner of the cargo, and rejected the law of Denmark and the various other countries put forward on behalf of the owners of the cargo. In the course of the judgment the various places in which the contract was to be performed were pointed out; but in adopting the French law the court relied on the subject-matter of the contract, the employment of a sea-going vessel for a service the greater and more onerous part of which was to be rendered on the high seas, where for all purposes of jurisdiction, criminal and civil, with respect to all persons, things, and transactions on board, she was, as it were, a floating island, over which France had as absolute, and for all purposes of peace as exclusive, a sovereignty as over her dominions by land, and which even when in a foreign port was never completely removed from French jurisdiction. These practical considerations formed the main ground of the judgment. The court declined to enter into any question as to the policy of the French law.

I have referred somewhat fully to this judgment in order to show that the principle upon which it proceeds is not confined to the particular facts of that case, but is applicable and ought to be applied not merely to questions of construction and the rights incidental to, or arising out of, the contract of affreightment, but to questions as to the validity of stipulations in the contract itself. Any distinctions founded on the difference of these questions were not rested on substantial ground, and would lead to uncertainty and confusion in mercantile transactions of this character. It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, namely, that of the flag; and so to hold is to adopt a simple, natural, and consistent rule. Westlake's *Private International Law*, 2d ed. p. 201.

In *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, there were no express stipulations pointing to the law of the country rather than to the law of some other country, but in *Peninsular and Oriental Steam Navigation Company v. Shand*, 3 Moo. P. C. (N. S.) 272, where also it was held that the contract was governed by the law of the flag, there were such stipulations, and Lord Justice Turner, in delivering the judgment of the Privy Council, inquired into the actual intention of the contracting parties as disclosed on the face of the contract. In that case the

contract was made between British subjects in England substantially for safe carriage from Southampton to Mauritius. The performance was to commence in an English vessel in an English port, to be continued in vessels which, for this purpose, carried their country with them, to be fully completed in Mauritius, but liable to breach, partial or entire, in several other countries in which the vessel might be in the course of the voyage. Into this contract there was introduced a stipulation professing to limit the liability of the shipowner, which stipulation was valid according to the law of England, but invalid according to the law of Mauritius. In discussing the intention of the parties the Lord Justice asked, in substance, whether it was contended that the stipulation should be construed according to the English law, which would give effect to it, or according to the French law, or some other law, which would give no effect to it, and he held that the actual intention of the parties must be taken clearly to have been to treat the contract as an English contract, to be interpreted according to English law, and that there was no rule of general law or policy setting up a contrary presumption, and consequently that the court below was wrong in not governing itself according to those rules. Now the difference in fact between that case and the present is that in that case the parties were both British subjects, and the contract was made in England, whereas in the present case one only of the parties is English, and the contract was made in Boston. But these differences, though proper to be taken into consideration on the general question, have little or no bearing on the question of the intention of the parties to be inferred from the particular stipulations.

In determining a question between contracting parties (to quote from the judgment in *Lloyd v. Guibert*, Law Rep. 1 Q. B. 120), recourse must first be had to the language of the contract itself, and, force, fraud, and mistake apart, the true construction of the language of the contract is the touchstone of legal right. The circumstance that the stipulations which the claimant asks to have struck out of the contracts are allowed by the law of one country and disallowed by the law of the other country, affords a cogent reason for holding that the parties were contracting with reference to the law of the country which allowed and not to the law which disallowed the stipulations. It is unreasonable to presume that the parties inserted in the contracts stipulations which they intended should be nugatory and void. But on the facts of this case a more limited proposition may be adopted. The loss occurred through the negligence of the shipowner's servants within the territorial waters, not of Massachusetts, but of Wales, that is, of a country where English law prevails. Conceding that it would be possible (without saying it would be reasonable) to presume that the parties contracted with reference to the law of Massachusetts in respect of any loss by negligence occurring within the territorial waters of that State, it appears to me that it would be unreasonable to presume that they contracted with reference to the law of that State in

respect of a loss by negligence occurring outside the limits of that State.

I hold, then, that the stipulations are valid, first, on the general ground that the contracts are governed by the law of the flag, and secondly, on the particular ground that from the special provisions of the contracts themselves it appears the parties were contracting with a view to the law of England.

From this judgment the claimant appealed.

The appeal came on to be heard on the 20th of June, 1888, but the hearing stood over to await the decision of the Montana Case in the Supreme Court of the United States.

The case came on again on the 1st of May, 1889, when a printed copy of the judgment in the Montana Case was produced to the court, from which it appeared that the stipulation in question was held by the Supreme Court to be void as being contrary to public policy.¹

Fry, L. J. The principles on which this case has to be decided have been familiar to the courts at any rate since the time of Lord Mansfield, who in the case of *Robinson v. Bland*, 2 Burr. 1077, expounded those principles of law, and they have been clearly stated since in many cases, among others in the well-known case of *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, 122, where the learned Judge, who delivered the judgment of the Exchequer Chamber, said: "It is, however, generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance," — and he goes on to enumerate instances from which the courts have gleaned a different intention. That view of the law was fully adopted in the case of *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589, in this court.

I think, therefore, the general principle on which we have to proceed is one which admits of no doubt; and the inquiry, therefore, is this: looking at the subject-matter of this contract, the place where it was made, the contracting parties, and the things to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this contract? By that I mean to determine its validity and its interpretation.

Now, in the first place, the ship was an English ship; the owners were an English company; England was the place to which the goods were to be brought and the place at which the final completion of the contract was to take place; and, what is still more important, the forms of the contract and the bills of lading were English forms. According to the law of England, the contract would be good in the terms in which it stood; whereas according to the law of the United

¹ Arguments of counsel and the concurring opinions of Lord HALSBURY, L. C., and COTTON, L. J., are omitted. — Ed.

States important terms of the contract would be excluded from it. That is, to my mind, a very cogent consideration to show that what must be presumed to have been the intent of the parties was this : that the law which would make the contract valid in all particulars was the law to regulate the conduct of the parties. Looking at all the circumstances of the case, I have no doubt that that is the conclusion which we ought to arrive at.

In coming to that conclusion, and in stating those principles, I am glad to find that I am in entire accordance with the law laid down in the American courts. It appears to me that the passages cited from Mr. Justice Story are strong in favor of the principle to which I have referred, and in the case of "*The Montana*" that rule was adopted in express terms by the Supreme Court of the United States. Lord Justice Cotton has read one passage from that judgment, and I will read another: "This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view;" and in that very case, in accordance with the principle so laid down, the Supreme Court proceeded to inquire whether there were any circumstances from which they ought to presume any other law than that of the place where the contract was made to have been presumed by the parties. Therefore, it is obvious in adopting the principles which I have stated we are proceeding not only according to the English law, but also according to the law of America. It is very desirable, if possible, that the law relating to the interchange of comity between nations should be the same.

There was only one other argument put forward to which I need refer, and it seemed to me to be a little halting between two statements. Sir Walter Phillimore laid down a proposition to this effect, that whenever the law of the place where the contract is made prohibits a particular stipulation in a contract no other country can treat that stipulation as valid. If by the word "prohibit" he means that the law of the United States has in terms prohibited or has rendered illegal or criminal the introduction of this stipulation, it appears to me that the decision in the *Montana Case* shows that that is not the law of the United States. That decision, I think, when fairly read, shows what one would expect to be the case, namely, that the courts have held that this stipulation being obnoxious to their public policy is void, not illegal, exactly in the same way as in this country we hold that stipulations which are in restraint of trade are not illegal, and that the entering into them does not constitute an illegal conspiracy, but they are void. If, on the other hand, it be argued that where the law of the place of the contract refuses to enforce a stipulation, then no other country will enforce that stipulation, we have a proposition which on

the face of it appears to me to be untenable. Therefore, whichever is the alternative of the proposition which Sir Walter Phillimore adopts, neither of them will support his case.

I think, therefore, the decision of Mr. Justice Chitty was correct, and that this appeal fails.¹

PRITCHARD v. NORTON.

SUPREME COURT OF THE UNITED STATES. 1882.

[*Reported 106 United States, 124.*]

ERROR to the Circuit Court of the United States for the District of Louisiana. This action was brought by Eliza D. Pritchard, a citizen of Louisiana, executrix of Richard Pritchard, deceased, against Norton, a citizen of New York, upon a bond made in New York by said Norton and another, conditioned to indemnify Pritchard against loss arising from his liability on an appeal bond already given by them as principals and signed by Pritchard as surety in Louisiana. Pritchard was called upon to pay money upon the appeal bond. The defendant set up by way of defence, that the bond sued on was executed and delivered by him to Pritchard in the State of New York, and without any consideration therefor, and that by the laws of that State it was void, by reason thereof. The court so ruled; the plaintiff excepted to the ruling, and now assigns the exception as error.²

MATTHEWS, J. It is claimed on behalf of the plaintiff that by the law of Louisiana the pre-existing liability of Pritchard as surety for the railroad company would be a valid consideration to support the promise of indemnity, notwithstanding his liability had been incurred without any previous request from the defendant. This claim is not controverted, and is fully supported by the citations from the Civil Code of Louisiana of 1870, art. 1893-1960, and the decisions of the Supreme Court of that State. *Flood v. Thomas*, 5 Mart. n. s. (La.) 560; *N. O. Gas. Co. v. Paulding*, 12 Rob. (La.) 378; *N. O. & Carrollton Railroad Co. v. Chapman*, 8 La. Ann. 97; *Keane v. Goldsmith, Haber & Co.*, 12 La. Ann. 560. In the case last mentioned it is said that "the contract is, in its nature, one of personal warranty, recognized by articles 378 and 379 of the Code of Practice." And it was there held that a right of action upon the bond of indemnity accrued to the obligee, when his liability became fixed as surety by a final judgment, without payment on his part, it being the obligation of the defendants upon the bond of indemnity to pay the judgment rendered against him, or to furnish him the money with which to pay it.

¹ *Acc. South African Breweries v. King*, [1899] 2 Ch. 173, [1900] 1 Ch. 273. — Ed.

² This statement of the case is substituted for that of the Reporter. Arguments of counsel and part of the opinion are omitted. — Ed.

The single question presented by the record, therefore, is whether the law of New York or that of Louisiana defines and fixes the rights and obligations of the parties. If the former applies, the judgment of the court below is correct; if the latter, it is erroneous.

The argument in support of the judgment is simple, and may be briefly stated. It is, that New York is the place of the contract, both because it was executed and delivered there, and because no other place of performance being either designated or necessarily implied, it was to be performed there; wherefore the law of New York, as the *lex loci contractus*, in both senses, being *lex loci celebrationis* and *lex loci solutionis*, must apply to determine not only the form of the contract, but also its validity.

On the other hand, the application of the law of Louisiana may be considered in two aspects: as the *lex fori*, the suit having been brought in a court exercising jurisdiction within its territory and administering its laws; and as the *lex loci solutionis*, the obligation of the bond of indemnity being to place the fund for payment in the hands of the surety, or to repay him the amount of his advance, in the place where he was bound to discharge his own liability.

It will be convenient to consider the applicability of the law of Louisiana, first, as the *lex fori*, and then as the *lex loci solutionis*.

1. The *lex fori*.

The court below, in a cause like the present, in which its jurisdiction depends on the citizenship of the parties, adjudicates their rights precisely as should a tribunal of the State of Louisiana according to her laws; so that, in that sense, there is no question as to what law must be administered. But, in case of contract, the foreign law may, by the act and will of the parties, have become part of their agreement; and, in enforcing this, the law of the forum may find it necessary to give effect to a foreign law, which, without such adoption, would have no force beyond its own territory.

This, upon the principle of comity, for the purpose of promoting and facilitating international intercourse, and within limits fixed by its own public policy, a civilized State is accustomed and considers itself bound to do; but, in doing so, nevertheless adheres to its own system of formal judicial procedure and remedies. And thus the distinction is at once established between the law of the contract, which may be foreign, and the law of the procedure and remedy, which must be domestic and local. In respect to the latter the foreign law is rejected; but how and where to draw the line of precise classification it is not always easy to determine.

The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract. . . .

The question of consideration, whether arising upon the admissibility of evidence or presented as a point in pleading, is not one of procedure and remedy. It goes to the substance of the right itself, and belongs to the constitution of the contract. The difference between the law of Louisiana and that of New York, presented in this case, is radical, and gives rise to the inquiry, what, according to each, are the essential elements of a valid contract, determinable only by the law of its seat; and not that other, what remedy is provided by the law of the place where the suit has been brought to recover for the breach of its obligation.

On this point, what was said in *The Gaetano & Maria*, 7 P. D. 137, is pertinent. In that case the question was whether the English law, which was the law of the forum, or the Italian law, which was the law of the flag, should prevail, as to the validity of a hypothecation of the cargo by the master of a ship. It was claimed that because the matter to be proved was, whether there was a necessity which justified it, it thereby became a matter of procedure, as being a matter of evidence. Lord Justice Brett said: "Now, the manner of proving the facts is matter of evidence, and, to my mind, is matter of procedure, but the facts to be proved are not matters of procedure; they are matters with which the procedure has to deal."

It becomes necessary, therefore, to consider the applicability of the law of Louisiana as —

2. The *lex loci solutionis*.

The phrase *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 48, where he defined it as a principle of universal law, — "The principle that in every forum a contract is governed by the law with a view to which it was made." The same idea had been expressed by Lord Mansfield in *Robinson v. Bland*, 2 Burr. 1077, 1078. "The law of the place," he said, "can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." And in *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that "it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, by what general law it is just to presume that they have submitted themselves in the matter." *Le Breton v. Miles*, 8 Paige (N. Y.), 261.

It is upon this ground that the presumption rests, that the contract

is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention.

So, Phillimore says: "It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfilment, — whether that place be fixed by express words or by tacit implication — as the place to the jurisdiction of which the contracting parties elected to submit themselves." 4 Int. Law, 469.

The same author concludes his discussion of the particular topic as follows; "As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted, either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements." 4 Int. Law, § 654, pp. 470, 471.

This rule, if universally applicable, which perhaps it is not, though founded on the maxim, *ut res magis valeat quam pereat*, would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld.

At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent.

It was expressly referred to as a decisive principle in *Bell v. Packard*, 69 Me. 105, although it cannot be regarded as the foundation of the judgment in that case. *Milliken v. Pratt*, 125 Mass. 374.

If now we examine the terms of the bond of indemnity, and the situation and relation of the parties, we shall find conclusive corroboration of the presumption, that the obligation was entered into in view of the laws of Louisiana.

The antecedent liability of Pritchard, as surety for the railroad company on the appeal bond, was confessedly contracted in that State, according to its laws, and it was there alone that it could be performed and discharged. Its undertaking was, that Pritchard should, in certain contingencies, satisfy a judgment of its courts. That could be done only within its territory and according to its laws. The condition of the obligation, which is the basis of this action, is, that McComb and Norton, the obligors, shall hold harmless and fully indemnify Pritchard against all loss or damage arising from his liability as surety on the appeal bond. A judgment was, in fact, rendered against him on it in Louisiana. There was but one way in which the obligors in the indemnity bond could perfectly satisfy its warranty. That was, the moment the judgment was rendered against Pritchard on the appeal bond, to come forward in his stead, and, by payment, to extinguish it. He was entitled to demand this before any payment by himself, and to

require that the fund should be forthcoming at the place where otherwise he could be required to pay it. Even if it should be thought that Pritchard was bound to pay the judgment recovered against himself, before his right of recourse accrued upon the bond of indemnity, nevertheless he was entitled to be reimbursed the amount of his advance at the same place where he had been required to make it. So that it is clear, beyond any doubt, that the obligation of the indemnity was to be fulfilled in Louisiana, and, consequently, is subject, in all matters affecting its construction and validity, to the law of that locality.

This construction is abundantly sustained by the authority of judicial decisions in similar cases.

In *Irvine v. Barrett*, 2 Grant's (Pa.) Cas. 73, it was decided that where a security is given in pursuance of a decree of a court of justice, it is to be construed according to the intention of the tribunal which directed its execution, and, in contemplation of law, is to be performed at the place where the court exercises its jurisdiction; and that a bond given in another State, as collateral to such an obligation, is controlled by the same law which controls the principal indebtedness. In the case of *Penobscot & Kennebec Railroad Co. v. Bartlett*, 12 Gray (Mass.), 244, the Supreme Judicial Court of Massachusetts decided that a contract made in that State to subscribe to shares in the capital stock of a railroad corporation established by the laws of another State, and having their road and treasury there, is a contract to be performed there, and is to be construed by the laws of that State. In *Lanusse v. Barker*, 3 Wheat. 110, 146, this court declared that "where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place."

The case of *Cox v. United States*, 6 Pet. 172, was an action upon the official bond of a navy agent. The sureties contended that the United States were bound to divide their action, and take judgment against each surety only for his proportion of the sum due, according to the laws of Louisiana, considering it a contract made there, and to be governed in this respect by the law of that State. The court, however, said: "But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the Treasury Department at the seat of government; and the navy agent is bound by the very terms of the bond to pay over such sum as may be found due to the United States

on such settlement; and such paying over must be to the Treasury Department, or in such manner as shall be directed by the secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the city of Washington, and the liability of the parties must be governed by the rules of the common law." This decision was repeated in *Duncan v. United States*, 7 Pet. 435.

These cases were relied on by the Supreme Court of New York in *Commonwealth of Kentucky v. Bassford*, 6 Hill (N. Y.), 526. That was an action upon a bond executed in New York conditioned for the faithful performance of the duties enjoined by a law of Kentucky authorizing the obligees to sell lottery tickets for the benefit of a college in that State. It was held that the stipulations of the bond were to be performed in Kentucky, and that, as it was valid by the laws of that State, the courts of New York would enforce it, notwithstanding it would be illegal in that State.

Boyle v. Zacharie, 6 Pet. 635, is a direct authority upon the point. There Zacharie and Turner were resident merchants at New Orleans, and Boyle at Baltimore. The latter sent his ship to New Orleans, consigned to Zacharie and Turner, where she arrived, and, having landed her cargo, the latter procured a freight for her to Liverpool. When she was ready to sail she was attached by process of law at the suit of certain creditors of Boyle, and Zacharie and Turner procured her release by becoming security for Boyle on the attachment. Upon information of the facts, Boyle promised to indemnify them for any loss they might sustain on that account. Judgment was rendered against them on the attachment bond, which they were compelled to pay, and to recover the amount so paid they brought suit in the Circuit Court for Maryland against Boyle upon his promise of indemnity. A judgment was rendered by confession in that cause, and a bill in equity was subsequently filed to enjoin further proceedings on it, in the course of which various questions arose, among them, whether the promise of indemnity was a Maryland or a Louisiana contract. Mr. Justice Story, delivering the opinion of the court, said: "Such a contract would be understood by all parties to be a contract made in the place where the advance was to be made, and the payment, unless otherwise stipulated, would also be understood to be made there;" "that the contract would clearly refer for its execution to Louisiana."

The very point was also decided by this court in *Bell v. Bruen*, 1 How. 169. That was an action upon a guaranty written by the defendant in New York, addressed to the plaintiffs in London, who, at the latter place, had made advances of a credit to Thorn. The operative language of the guaranty was, "that you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty." The court said: "It was an engagement to be executed in England, and must be construed and have effect according to the laws of that country," citing *Bank of the United States v.*

Daniel, 12 Pet. 54. As the money was advanced in England, the guaranty required that it should be replaced there, and that is the precise nature of the obligation in the present case. Pritchard could only be indemnified against loss and damage on account of his liability on the appeal bond, by having funds placed in his hands in Louisiana wherewith to discharge it, or by being repaid there the amount of his advance. To the same effect is *Woodhull v. Wagner*, Baldw. 296.

We do not hesitate, therefore, to decide that the bond of indemnity sued on was entered into with a view to the law of Louisiana as the place for the fulfilment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration, should be determined by the law of Louisiana, and not that of New York. For error in its rulings on this point, consequently, the judgment of the Circuit Court is reversed, with directions to grant a new trial.

*New trial ordered.*¹

CARNEGIE v. MORRISON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[*Reported 2 Metcalf, 381.*]

SHAW, C. J.² Action of assumpsit, brought by Carnegie & Co., a mercantile firm at Gottenburg, Sweden, against Messrs. Morrison, Cryder, & Co., of London. The action is founded upon a letter of credit given by the defendants, by Mr. Oliver, their general agent, residing in Boston, upon the application of Mr. John Bradford, in favor of the plaintiffs, and for the purpose of paying, in part, a large debt due from Bradford to the plaintiffs for merchandise before shipped to him on credit. The letter of credit is of the following tenor:

“BOSTON, 4 March, 1837.

“MESSRS. MORRISON, CRYDER, & Co., London: — Mr. John Bradford of this city having requested that a credit may be opened with you for his account in favor of Messrs. D. Carnegie & Co. of Gothenburg for three thousand pounds sterling I have assured him that the same will be accorded by you on the usual terms and conditions.

“Respectfully your obt. serv’t,

“FRANCIS J. OLIVER.

“For £3,000.”

It appears by the evidence that Oliver was the general agent of the defendants in Boston; that this letter of credit was obtained upon the

¹ *Acc. Seiders v. Merchant's Life Assoc.*, 93 Tex. 194, 54 S. W. 753. Conversely it has been held that a contract valid at the place of making but void by the law of the place of performance is invalid. *Hawley v. Bibb*, 69 Ala. 52 (*semble*); *Thayer v. Elliott*, 16 N. H. 102. — ED.

² Part of the opinion only is given. — ED.

application of Bradford, and was immediately forwarded to the plaintiffs at Gottenburg; and that notice of it was given to the defendants at London. Mr. Oliver knew the purpose for which Bradford wanted it. He had often had similar letters of credit from Mr. Oliver before; all of which have been honored, except one other in favor of Scholfield & Co., which is now in controversy in this court. Mr. Bradford was accustomed to give satisfactory security, from time to time, to Mr. Oliver, and to pay the defendants a commission of one per cent. It also appears that upon the strength of this letter of credit, the plaintiffs drew a bill or bills on the defendants, according to the usual mode of drawing bills at Gottenburg on London, which the defendants declined accepting. Various other circumstances were given in evidence, but this is a summary of the leading facts in the case.

This action, if it can be maintained at all, as between these parties, must be maintained on the letter of credit. But a question meets us at the outset, what law shall determine the rights of the parties in this transaction? It is obvious that the undertaking of the defendants was to do some act out of this country. The substance of that undertaking was to give Bradford a credit for the use and benefit of Carnegie & Co.; in other words, the substance and effect of that undertaking was to pay a sum of money to Carnegie & Co. in discharge of Bradford's debt to them, by means of bills of exchange to be drawn by Carnegie & Co. on the defendants, in their own favor, or in favor of their appointee, for their use, in consideration of the promise of Bradford to provide funds to meet those bills, giving them satisfactory security, placed in the hands of their agent, and in further consideration of a commission of one per cent paid by Bradford.

In considering the nature of this transaction, the inquiry involves two questions: first, whether the transaction in question constitutes a contract, in which the plaintiffs have an interest; and, secondly, whether the interest of the plaintiffs in this contract is of such a character that they can maintain an action upon it in their own names. The question, therefore, does not depend exclusively upon the *lex fori*, although, as the action is brought in this Commonwealth, its laws must determine whatever relates to the remedy. Supposing that the *lex loci contractus* is also to have a bearing on the question, it must be considered that some of the rules applicable to the construction and effect of contracts are founded in positive law, established by usage or by statute, which each country will establish for itself, according to its own views of convenience and policy, and have a local operation; whilst others are derived from those great and unchangeable principles of duty and obligation which are everywhere recognized amongst mercantile communities, and indeed amongst all civilized nations, as lying at the foundation of civil contracts, and must be considered as having the same effect, wherever by the comity of nations contracts made in one country are allowed to be carried into effect by the laws of another. In some States, for instance, a bond made to one or his assigns is re-

garded as a negotiable instrument, and creates an obligation to pay to the obligee, or any person who shall legally become the assignee of it. In others, a note for money, payable to one or order, creates a legal obligation to the payee only, and an indorsee cannot maintain a suit in his own name. Whether an instrument, made in a particular form, shall have the one or the other construction, will depend upon the positive law of the country which governs it; and such law therefore will determine the nature and legal obligation of the contract created by it; it is positive law, concurring with, and giving effect to, the act of the parties, which determines the nature and extent of such contract. But that a party entering into a formal stipulation to pay money, or do some other beneficial act to or for another, shall substantially perform that undertaking, is a great principle of moral as well as legal obligation, and of international as well as municipal law, recognized everywhere.

Taking it as settled, in the present case, that the defendants became subject to a duty or obligation of some kind, the real subject of discussion is not merely as to the remedy, but whether the facts now in proof constituted a contract between these parties which may be enforced by an action.

The objection to such an action, and the ground of this defence, are that the immediate parties to the transaction were Bradford on the one side and the defendants on the other; that to this transaction the plaintiffs were strangers; and that as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him and not with the plaintiffs. But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them and others, who may subsequently assent to, and become interested in its execution; an assumption quite too broad and unlimited, which the law does not warrant. In a common bill of exchange, the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that if he does accept and pay the bill, he, the drawer, will allow the amount in account, if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid. He also contracts with any person who may become indorsee, that he will pay him the amount if the drawee does not accept and pay the bill. The law creates the privity. So in the familiar case of money had and received, if A. deposits money with B. to the use of C., the latter may have an action against B., though they are in fact strangers. But if C., not choosing to look to B. as his debtor, calls upon A. to pay him, notwithstanding such deposit (as he may), and A. pays him, A. shall have an action against B. to recover back the money deposited if not repaid on notice and demand. The law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded. *Hall v. Marston*, 17 Mass. 575. So in regard to a very common transaction; when one

deposits money in a bank to the credit of a third person, and forwards him a certificate, or other evidence of the fact, the bank is regarded as coming under an obligation to pay the money to the person to whose credit it is thus deposited. So it is held in England, when the depositary assents to receive the money, though there is no consideration moving from the plaintiff to the defendant. *Lilly v. Hays*, 5 Adolph. & Ellis, 548. We think, therefore, it is no decisive objection to an action by the plaintiffs, that the act done constituted, at the same time, a contract between the defendants and Bradford, on which the latter might provisionally have had a remedy, in case the plaintiffs should not assent to, and enforce the contract, so far as it was intended for their benefit.

From this view of the case, it is manifest that the question whether a particular transaction constitutes a contract, and between whom, upon which one party can have a remedy against another by judicial proceedings, must depend upon the law governing such contract, as well as the law of the forum where it is sought to be enforced. The remedy may be sought in the form of an action at law, or a bill in equity, or before any special tribunal, according to the law of the place where it is sought. But the question whether a particular act or instrument constitutes a contract, and between what parties, is previous in its nature, and must generally be settled before any question of remedy arises.

What then is the law of the contract, or, in other words, what law determines whether an act done constitutes a contract, and if so, between whom and to what effect? The general rule certainly is, that the *lex loci contractus* determines the nature and legal quality of the act done; whether it constitutes a contract; the nature and validity, obligation and legal effect of such contract; and furnishes the rule of construction and interpretation. There may, perhaps, be exceptions to this rule; as where parties happen to meet on a desolate island in a savage country, where the principles of commerce and civilization do not prevail, or where a settled municipal law is not enforced or regarded. Perhaps such would be the construction of a contract between American or European merchants in China, who rather reside on the confines of that empire than live under its government; and where they may be presumed to have reference, in their dealings, to the general laws and usages of the commercial world, without regard to the laws of the people with whom they temporarily reside. But a contract, made in one country, may contemplate the execution of deeds or other contracts, making payments, or doing other legal acts in another; in regard to which, the law of the foreign country, where the act is to be done, will govern the contract; and the obligation of such contract will bind the contracting party to do all such legal acts according to the law of the place where they are to operate, so as to have their full legal effect. As if a person in one country should contract to convey land in another; the general rule being that the *lex loci rei sitæ* fur-

nishes the rule which regulates titles and conveyances of real estate, the true construction and legal effect of such contract would be that the conveyance should be executed in such form as effectually to transfer the title according to the law of the place where the land lies. If the land were in Massachusetts, where the law requires the execution and acknowledgment of a deed, it would bind the contracting party to execute and acknowledge such deed, though made in a country where, by its municipal law, a deed would not be necessary. If the stipulation be that the drawee shall accept a bill in a foreign country, and the law of that country require that a valid acceptance shall be in writing, though not required by the law of the place where drawn, it is a contract that the drawee shall accept the bill in writing.

That the transaction now in question constituted a good contract to some purpose, and between some parties; that it was made on a good, valuable, and adequate consideration, and made in Massachusetts, is not contested. Then the rule *prima facie* is, that the construction and legal effect of this transaction are to be determined by the law of Massachusetts. That is the law which must be regarded, in the first instance, in deciding whether the act done constituted a contract, and if so, between whom, and to what effect, and must prevail unless the case falls within some exception to the general rule; and the question is whether it does. It is true that the parties to this suit are both foreigners, one residing in Sweden and the other in England. This, however, is immaterial, and only respects the question who may sue and be sued in our courts. By the comity of nations, alien friends are allowed the benefit of our courts in seeking their civil rights as plaintiffs; and the defendants, by placing their property under the control and protection of our government, place themselves within the jurisdiction of our courts. But the immediate actors in the transactions were here. Bradford, the prime mover, who opened and conducted the negotiation, paid the consideration, and caused the obligation to be entered into, was a resident citizen of Massachusetts; and though in legal strictness he might not be considered as the agent of the plaintiffs before they had assented to and adopted his act, yet still he so far acted for them as to procure a stipulation, which, if executed, would inure to their benefit. The other party, though domiciled abroad, were here for the purpose of conducting mercantile and financial business by their regularly constituted resident agent. The money was paid, or the security given, in Boston, which constituted the consideration for the defendants' undertaking. The negotiation, which terminated in giving the letter of credit, was commenced and completed in Boston.

That some things are referred to foreign laws and usages, in this agreement, is manifest in the instrument itself. The words, "on the usual terms and conditions," are obviously of this character. They refer to the laws and usages both of Sweden and England. All parties, of course, knew that the credit was to be given by the defendants by means of bills of exchange, although this is not expressed in terms.

Supposing that the object was that this credit should be afforded by means of bills of exchange, to be drawn by Carnegie & Co. in Gottenburg, on Morrison & Co. in London, the instrument refers to the laws and usages of Sweden for the mode of drawing, and to those of England for the mode of acceptance; and the legal effect and obligation of the contract in Boston are that the parties will respectively conform to those laws and usages in the performance of their respective acts. But it is not as to the non-observance of any of these that the question arises. The gravamen of the complaint is that the defendants have violated the obligation of their contract in its entire substance. It becomes, therefore, necessary to inquire and ascertain more exactly what that contract, in its legal effect and operation, was. The substance of the undertaking of the defendants may, we think, be simplified and expressed thus: Whereas, John Bradford is indebted to Messrs. Carnegie & Co. of Gottenburg, in the sum of £3,000, and has requested us to pay them that amount for him, by means of bills of exchange to be drawn on us at London; we hereby, for value received of him for that purpose, to our satisfaction, promise to accept their bills to that amount, payable to themselves or their order, and pay them accordingly.

The question is, supposing a general failure in the performance of this undertaking, who is entitled to a remedy for such breach, and by what law shall this question be determined? The assurance or promise is in terms made to Bradford; but the substantial benefit to be derived from the performance of it would be the plaintiffs', and therefore they are damnified by the breach. Bradford had procured the defendants to pay his debt for him to the plaintiffs for a satisfactory pecuniary consideration, and immediately gave notice thereof, and remitted the contract to the plaintiffs, who assented to and accepted it. It may be fairly presumed that, but for this transaction, Bradford would have adopted some other mode of remittance. Regarding it as a question of principle and not of technical law, it was an undertaking in which the plaintiffs had an interest nearly or quite as direct, and as great, as if the promise had been in terms to them, or the negotiation had been with them; or as if the instrument had been a promissory note, procured by Bradford to be made payable to them, in consideration of money paid and security given by him, and such note afterwards remitted to and received by them. Upon these facts, the court are of opinion that the construction, the obligation, the legal effect and operation of this transaction are to be governed by the law of Massachusetts. So far as this transaction constituted a legal and binding contract at all, it was, we think, by force of the law of the place of contract operating upon the act of the parties, and giving it force as such. The undertaking, it is true, was to do certain acts in England, to wit, to accept and pay the plaintiffs' bills; but the obligation to do those acts was created here, by force of the law of this State, giving force and effect to the undertaking of the defendants' agent, and mak-

ing it a contract binding on them. Supposing the law of England had provided that no letter of credit should be issued, unless under seal, or stamped, or attested by two witnesses, or acknowledged before a notary, is it not clear that, as no such formalities are required by our laws, a letter of credit made here would be held good without such formalities? We think it would be so held even in England, under the authority of the general rule, that a contract, valid and binding at the place where made, is binding everywhere. There is no reference, tacit or express, in this instrument, to the laws of England, which can raise a presumption that the parties looked to them as furnishing the rule of law which should govern this contract. It was, therefore, in our opinion, in legal effect, a contract made in Massachusetts by parties, both of whom were here by their agents, or persons acting for their benefit and in their behalf, and therefore the nature, obligation, and effect of this contract must be governed by the law of this Commonwealth.¹

KENNEDY v. COCHRANE.

SUPREME JUDICIAL COURT OF MAINE. 1876.

[*Reported 65 Maine, 594.*]

ASSUMPSIT, on account annexed.

The plaintiff was an innkeeper in St. Stephen's, New Brunswick, duly licensed, under the statute of that province, to sell liquor as a retail dealer; the liquor sued for was sold at retail by the plaintiff to the defendant, who then was, and is now, a resident of Calais, Maine; the liquor sold was not for re-sale, but was for the defendant's own use; the items of the account were charged by the plaintiff to the defendant, who has never paid the account nor any part of it; the items were all for glasses and pints of liquor, except the first item, which was to balance of old account \$2.01, which old account was for liquor.

Acts of New Brunswick, on the subject, make a part of the case.

If the action is maintainable, the defendant to be defaulted; otherwise, the plaintiff to be nonsuit.

APPLETON, C. J. This is an action of assumpsit for liquors sold the defendant by the plaintiff, a licensed innholder in St. Stephen's, New Brunswick. The sale was by the glass or pint, and charged at the time of delivery.

By an act of the general assembly of New Brunswick, passed in 1873, c. 10, § 16, it was enacted that "no innkeeper, or tavern keeper, who shall sell upon trust or credit, any liquors, mixed or unmixed, to any person, shall have any remedy against the said person, his executors or administrators, either in law or equity, for the recovery thereof; and if

¹ *Acc. Bradshaw v. Newman*, 1 Ill. 94; *Woodruff v. Hill*, 116 Mass. 310. — Ed.

any bill, bond, note, mortgage, or other security or conveyance shall be made and delivered, the consideration, or any part of the consideration of which, shall be proved to be for liquors sold, the same shall be taken to be fraudulent and void in all courts of justice," etc.; "and if any pawn or pledge shall be left, by any person, with any tavern or innkeeper, it shall be lawful for any justice of the peace of the county in which such pawn or pledge may have been left on complaint and proof of the same, to order the said pawn or pledge to be restored, and shall further convict the inn or tavern keeper who may have received the same, in a penalty not exceeding twenty dollars for each offence."

The tavern or innkeeper who sells on credit is without remedy. All securities given for such sales are declared fraudulent and void. All pawns or pledges left are to be restored, and the tavern or innkeeper receiving the same is liable in a penalty of twenty dollars for each offence.

The liquors, for which this suit is brought, were charged. They were not sold for cash. They were sold on trust or credit, and hence they were charged. If sold on trust or credit, the plaintiff is without remedy, by the law of New Brunswick, where the sales were made. Sales of liquors on trust or credit must be regarded as prohibited, when by the statute the seller is without remedy. The license to sell applies only to sales for cash. Such is the obvious intention of the statute.

The sales to the defendant were in palpable violation of the law of the place where they were made. The plaintiff could not recover in New Brunswick. Is his chance improved by a change of jurisdiction?

The general rule is, that contracts void by the law of the land where made are void everywhere else, and that what is a good defence in the place of contract is a valid one wherever the contract is attempted to be enforced. It is well settled by the principles of international comity, that the laws of every people in force within their own limits ought to have the same force as to contracts there made, everywhere, so far as they do not prejudice the powers or rights of other governments, or of their citizens. It would be a queer illustration of the comity of nations to enforce in a foreign jurisdiction a contract void by the law of the place where it was entered into. Nor do we think there is to be found anything in our statutes or decisions which should particularly encourage an attempt to enforce a contract like the present in this jurisdiction.

Plaintiff nonsuit.

DICKERSON, DANFORTH, VIRGIN, PETERS, and LIBBEY, JJ., concurred.¹

¹ *Acc. Archer v. Ins. Co.*, 2 Bush, 226; *Bell v. James*, 6 Mart. n. s. 74; *Ivey v. Lalland*, 42 Miss. 444; *Bliss v. Brainard*, 41 N. H. 256; *Thatcher v. Morris*, 11 N. Y. 437 (cf. *Kentucky v. Bassford*, 6 Hill, 526); *Touro v. Cassin*, 1 N. & McC. 173.—Ed.

BLACKWELL v. WEBSTER.

CIRCUIT COURT OF THE UNITED STATES. 1886.

[Reported 23 Blatchford, 537.]

BENEDICT, J. The plaintiff's right to recover in this action depends upon the validity of an agreement made between him and the defendant Webster, whereby, in consideration of services to be performed by the plaintiff, as attorney, in prosecuting the defendant Webster's claim to a legacy of \$10,000, left a deceased daughter, by the last will and testament of her uncle, one Brady, one-third of the money that the defendant Webster might recover under said will, as heir at law of his daughter, was assigned to the plaintiff.

At the time of the making of this agreement the plaintiff was a resident of the State of New York, and the defendant Webster a resident of the State of Maine. The agreement was entered into in the State of Maine, and there it was reduced to writing and executed. At that time, as now, there was in force, in the State of Maine, a statute providing, that "any person agreeing to prosecute or defend a suit at law or equity upon shares, shall be punished by a fine not exceeding one thousand dollars, nor less than twenty dollars, or by imprisonment not more than one year;" and one of the questions presented for decision here, by the defendants, is, whether the effect of this statute of Maine is to render void the agreement upon which the plaintiff bases his right to recover.

In determining this question, it is to be observed, that the act made criminal by the statute of Maine is not the act of prosecuting a suit on shares, but the act of making an agreement to prosecute a suit on shares. It is also to be observed, that the statute is not confined to agreements respecting suits to be prosecuted in the courts of Maine, but includes all agreements to prosecute a suit on shares, without regard to the place where the suit is to be instituted. Its plain object is to prevent the making of agreements of the character described, within the State of Maine. It is also to be observed, respecting the agreement in question here, that it contains no language limiting its operation to the prosecution of suits outside of the State of Maine, but includes suits instituted in the State of Maine, as well as elsewhere. It is, however, true, that the circumstances attending the making of the agreement show that the object of the agreement was to procure the institution of a suit in New York, that a suit in Maine was not contemplated, and that all the services rendered by the plaintiff, in pursuance of the agreement, were performed in New York.

Upon the facts, the plaintiff, in opposition to the contention of the defendants, insists that his agreement was an agreement to be performed in New York, and, therefore, is to be judged according to the law of New York, and not according to the law of Maine. Upon this

question my opinion is, that the validity of the agreement in question is to be determined by the law of Maine, and that the effect of the statute of Maine, already referred to, is to render the agreement void. For the plaintiff, when he entered into the agreement in question, did an act made criminal by the law of the place where the act was done. The statute of Maine forbade the doing in the State of Maine precisely what the plaintiff did when he agreed to prosecute Webster's suit on shares. As soon as the agreement was made the plaintiff became liable to indictment in the courts of Maine for making the agreement, and to such an indictment it would have been no answer to say that he contemplated doing other acts in New York, in accordance with the agreement. A criminal act can never be the foundation of a lawful agreement. The agreement was void at its inception, because the making of such an agreement was made criminal by law. For this reason the agreement could not be enforced in a court in Maine, and, if not enforceable in Maine, is not enforceable elsewhere. Says the Supreme Court of the United States, in *Coppel v. Hall* (7 Wall. 559): "The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." So, also, the Court of Appeals of New York, in *Hyde v. Goodnow*, 3 N. Y. 269, says: "Assuming that the contracts in question had been made in Ohio, and that, by the laws of that State, such contracts are declared void, the courts of this State would be bound also to declare them void, though by their terms they were to have been performed here, and though, if made here, they would have been valid contracts."

But the plaintiff contends that this contract was lawful because the place of performance was in New York. But it seems to me to be plain that, inasmuch as the act of making the agreement could not lawfully be done in Maine, the circumstance that other acts were intended to be done in New York in pursuance of the agreement, cannot render lawful the act that was done in Maine. In such a case as this, there is no room to apply the fiction of the law, that the place of performance of a contract is to be deemed the place of making it. Here the question of the illegality of the agreement arose before anything was done in New York, because of the character of the agreement, and not because of the character of acts intended to be performed in pursuance of the agreement.

The plaintiff, for what he did in performance of his agreement within the State of New York, could not be indicted in Maine, but for what he did in Maine he could be there indicted, and that act is the foundation of his claim to recover in this action. He is asking the law to enforce a claim founded on a violation of a law. It is upon this point that I base my decision, and I find nothing in any case cited, including *Pritchard v. Norton*, 106 U. S. 124, that should compel a different conclusion.

But it may be added, that it is far from clear that New York can be held to be the place of performance of the agreement in question. As executed in Maine, the agreement constituted a present assignment,

then and there made by Webster, of an interest in a claim then belonging to him, a citizen of Maine. The plaintiff was to be paid one-third of such sum as might be received by Webster by virtue of the will. A reception of the money by Webster, before any division with the plaintiff, was clearly contemplated, and there is nothing whatever to indicate that such division was to be made in New York. The situs of Webster's personal property is Maine, and what the agreement provided for is a division of a portion of his property. It seems difficult, therefore, to hold that New York was, by the agreement, made the place of performance. My decree, therefore, is, that the plaintiff cannot recover, and his action is accordingly dismissed.

Inasmuch as no appeal can be taken from my decree, I have delayed promulgating this opinion, in order to submit it to Mr. Justice Blatchford, when holding court in this district, and, having so submitted it, I am authorized by him to say that he concurs therein.¹

ARBUCKLE *v.* REAUME.

SUPREME COURT OF MICHIGAN. 1893.

[*Reported 96 Michigan, 243.*]

LONG, J.² This action was brought to recover upon two promissory notes, dated February 4, 1889, and executed and delivered to the plaintiffs' agent in this State, but payable at plaintiffs' office, at Toledo, Ohio. The defendant, Peter Donnelly, pleaded the general issue, and denied the execution of the notes. The other defendants did not appear, and were defaulted.

It was admitted that, while the notes bore date as of Monday, they were in fact executed and delivered to the agent of the payees in this State on Sunday. The court below ruled that, though the notes were executed and delivered in this State on Sunday, yet, the testimony showing that the office of the plaintiffs was in Ohio, and the contract to be performed there, that they were not void, under section 2015, How. Stat., as the laws of Ohio, and not of Michigan, governed the transaction; and judgment was given in favor of the plaintiffs. . . .

The court below was in error in holding that the notes could be

¹ *Contra*, Richardson *v.* Rowland, 40 Conn. 565. In that case, Foster, J., said: "The contract between these parties, however, was in regard to a suit pending in the State of New York; the property attached was there situate; the services to be performed were to be performed there; and the money to be recovered, if recovered at all, was there to be recovered. The contract in short was to be performed in the State of New York. The law of New York, therefore, must necessarily govern the contract. *Commonwealth of Kentucky v. Bassford*, 6 Hill, 526. It becomes quite unnecessary to decide what the law of Connecticut, or of other States, may be on the subject of champerty and maintenance." — Ed.

² Part of the opinion is omitted. — Ed.

enforced here by reason of being made payable in Ohio. Parties cannot be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the State.

It is an elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. 7 Wait, Act. & Def. p. 114; Myers v. Meinrath, 3 Amer. Rep. 371.

The judgment must be reversed, and a new trial ordered.

The other justices concurred.¹

X made notes to π. The notes which Δ indorsed that Δ should be liable of ~~most~~ what Δ collected assigned to him. Δ & By Vt. la took pl was ad in Mass. &

BAXTER NATIONAL BANK v. TALBOT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[Reported 154 Massachusetts, 213.]

MORTON, J. The plaintiff seeks to recover in this suit from the defendant as indorser on five promissory notes, and to reach and apply in payment of them the interest of the defendant in a partnership of which he is a member. The notes were made by the Esperanza Marble Company, to its own order, were indorsed in blank by it and the defendant, and by two other parties, and were all made payable at the "Baxter National Bank, Rutland, Vt.," which we assume to be the plaintiff bank. This suit is against the defendant alone. The defendant in his answer alleged that his indorsement was made and took effect as a contract in the State of Vermont, and that by the law of that State his obligation depended, as between the plaintiff and himself, or any other party taking the notes with notice, upon the understanding or agreement between the bank and himself at the time when each indorsement was made in regard to said indorsement. The defendant further alleged that his indorsement was in fact made subject to an oral agreement with the plaintiff, which the defendant has fully performed, that "he was not to be liable thereon except to the amount of any moneys which he might receive upon a certain mortgage upon property in the State of New York." At the trial, the defendant offered testimony tending to prove these allegations. The court received it *de bene*, and at the conclusion of all the testimony ruled that the *lex fori* and not the *lex loci contractus*, must govern the case; that the oral agreement and the evidence tending to prove it were inadmissible and immaterial, and could not be considered by the jury. The defendant excepted to this ruling, and the question before us is as to its correctness.

¹ Acc. Swann v. Swann, 21 Fed. 299; McKee v. Jones, 67 Miss. 405, 7 So. 348.—Ed.

The testimony introduced by the defendant tended to show the following, among other facts, in regard to his indorsement of the notes in suit. In January, 1887, the plaintiff bank held overdue notes which it had discounted for the Esperanza Marble Company of New York, but which had its usual place of business in Rutland. Part of these notes were indorsed by the defendant. The plaintiff also held a mortgage on certain property in New York as collateral to these notes, but found it inconvenient to attend to its collection, and requested the defendant to attend to it in its behalf; and it was orally agreed between the defendant and the plaintiff that the mortgage should be assigned to the defendant, and that he should collect the same and pay over the proceeds to the bank. It was also orally agreed that the notes held by the bank against the Marble Company should be surrendered to it and new notes given by it therefor, which should be indorsed by the defendant and the other two parties whose names are on the notes in suit, and that the notes should be renewed from time to time as they fell due, the renewals being indorsed by the same parties, until the total amount collectible on the mortgage had been received and paid over by the defendant to the plaintiff bank. It was further orally agreed that the defendant should not be liable on his indorsements beyond the amount which he might receive on account of the mortgage and fail to pay over to the plaintiff, and that he should be held liable on his indorsements only to secure the performance of his agreement to collect and pay over on account of the mortgage. The agreement thus made was carried out. The overdue notes of the Marble Company were surrendered to it, and new notes, indorsed by the defendant and the other parties, were taken in their stead. These have been renewed from time to time, the renewals being indorsed by the same parties, and the notes in suit are renewals of said original notes. The notes have all been made payable at the plaintiff bank in Rutland, and the defendant's indorsement upon all of them was made and took effect as a contract made in Vermont. The mortgage was assigned to the defendant, and he has paid over to the plaintiff bank all the money which he has collected under it.

The jury found by direction of the court that the notes in suit were made payable in the State of Vermont, and that the defendant's indorsement was made and took effect as a contract in that State.

It is apparent that, if the *lex fori* is to govern, the defendant cannot avail himself of the oral agreement entered into between the plaintiff and himself. *Adams v. Wilson*, 12 Met. 138; *Wright v. Morse*, 9 Gray, 337. We do not think, however, that it should govern. It is clear that in all that relates to a contract, to its nature and validity and interpretation, the law of the place where it is made governs. *Carnegie v. Morrison*, 2 Met. 381; *Milliken v. Pratt*, 125 Mass. 374; *Shoe & Leather National Bank v. Wood*, 142 Mass. 563; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; *Nichols v. Mase*, 94 N. Y. 160; *Buzzell v. Cummings*, 61 Vt. 213; *Forepaugh v. Delaware, Lackawanna, &*

Western Railroad, 128 Penn. St. 217; Liverpool & Great Western Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 453. The law of the place where the contract is made is, without any express assent or agreement of the parties, incorporated into and forms a part of the contract. Contracts are presumed to be made with reference to the law of the place where they are entered into, unless it appears that they were entered into with reference to the law of some other State or country. Central Bank of Washington *v.* Hume, 128 U. S. 195, 207; Chapin *v.* Dobson, 78 N. Y. 74.

A contract valid in the State or country where it is made will be enforced even in a State or country where it would be invalid, provided it be not there contrary to public policy or morals. Parsons *v.* Trask, 7 Gray, 473; Milliken *v.* Pratt, 125 Mass. 374; Fonseca *v.* Cunard Steamship Co., 153 Mass. 553; Forepaugh *v.* Delaware, Lackawanna, & Western Railroad, 128 Penn. St. 217.

On the other hand, it is equally clear that, in all that relates to the procedure for enforcing a contract, the law of the forum controls. Carnegie *v.* Morrison, 2 Met. 381; Hoadley *v.* Northern Transportation Co., 115 Mass. 304; Shoe & Leather National Bank *v.* Wood, 142 Mass. 563. Thus the form in which and the parties by or against whom the action shall be brought, the competency of the evidence offered to establish the alleged cause of action, whether the cause or action is barred by the statutes of limitation, whether a party can maintain an action in his own name or is obliged to use that of another, whether a contract is negotiable, and whether it is to be sued on as a specialty or as a simple contract, with many other similar things, have been held to be matters affecting the remedy, and therefore to be governed by the law of the forum. Pearsall *v.* Dwight, 2 Mass. 84; Orr *v.* Amory, 11 Mass. 25; McClees *v.* Burt, 5 Met. 198; Foss *v.* Nutting, 14 Gray, 484; Richardson *v.* New York Central Railroad, 98 Mass. 85; Hoadley *v.* Northern Transportation Co., 115 Mass. 304; Leach *v.* Greene, 116 Mass. 534; Drake *v.* Rice, 130 Mass. 410; Downer *v.* Chesebrough, 36 Conn. 39; Leroux *v.* Brown, 12 C. B. 801; Stoneman *v.* Erie Railway, 52 N. Y. 429.

It is sometimes difficult to decide whether the question raised in a given case relates to the nature and validity of the contract or to the remedy upon it. We think in the present instance it relates to the former, and not to the latter. The defendant contended that under the laws of Vermont his obligation growing out of his indorsements was not an absolute one, but depended, as between the parties, upon the oral agreement or understanding between them, if any, at the time when he placed his name upon the notes. The defendant further contended that, when he placed his name upon the notes, he did so under an oral agreement with the plaintiff bank, by the terms of which his indorsement was only to be regarded as security for the payment by him to the bank of the money that he might collect on the mortgage which was assigned to him.

Assuming, as we must for the purposes of this case, that the law of Vermont was as stated by the defendant, the testimony offered by him bore clearly upon the nature and validity of the contract between himself and the bank. The defendant could not show what the agreement was in any other way than that in which he offered to show it. It was not an attempt on his part to vary a written contract, because, under the law of Vermont, the indorsement did not of itself constitute an absolute contract; but, in order to determine what the contract was, it was necessary to ascertain what agreements or undertakings were entered into at the time, and in connection with and as part of the indorsement. If there were none, then the contract between the plaintiff and the defendant was the usual contract growing out of a blank indorsement. If there were such undertakings or agreements, then they entered into and formed a part of the contract of indorsement. The evidence was rejected, not because it would have been incompetent to prove the facts which it was offered to establish, had the contract been valid in this State, but on the ground that it related to a matter affecting the remedy. Back of the question of remedy, however, lies the question of the contract itself, and we think the evidence should have been allowed as bearing upon that. See *Powers v. Lynch*, 3 Mass. 77; *Williams v. Wade*, 1 Met. 82; *Shoe & Leather National Bank v. Wood*, 142 Mass. 563; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Burrows v. Jemino*, 2 Strange, 733; *Wattson v. Campbell*, 38 N. Y. 153; *Dunn v. Welsh*, 62 Ga. 241; *Forepaugh v. Delaware, Lackawanna, & Western Railroad*, 128 Penn. St. 217.

The plaintiff objects that there was no issue framed upon the laws of Vermont. But the ruling of the court rendered such an issue immaterial; besides, an issue could at any time have been framed, in the discretion of the court, if satisfied that justice required that it should be done, or the court could hear and pass upon the question itself. *Atlanta Mills v. Mason*, 120 Mass. 244.

Exceptions sustained.

co's agent in Mass..
Payable to insured's wife,
living to her children. She
lives, then insured.
parties determined

MILLARD v. BRAYTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901.

[Reported 178 Massachusetts, 000.]

HAMMOND, J.¹ In 1868 the Mutual Life Insurance Company of New York issued a policy upon the life of Shubael W. Brayton, then a resident of North Adams, in this State, in the sum of \$10,000, "for the sole use of his wife," Sarah W. Brayton, the money to be paid to her if living at the death of her husband, "and, if not living, to her chil-

¹ Part of the opinion only is given. — ED.

dren, or her guardian for their use." She died in 1877, leaving her husband and three children, surviving. Of these children, William, never having married, died in 1881, a minor. Harriott died in 1888, leaving a husband, but no children, surviving. Isabelle, in 1876, married the plaintiff, and in 1894 died, leaving him, but no children, surviving. Samuel W. Brayton died in 1897, leaving the defendant, his second wife, surviving, and she is his executrix and sole legatee. In 1890, by an agreement between Mr. Brayton and the company, the policy was "continued as and for a paid-up policy" for \$6,217, no further premiums to be required, "except in cases where an extra premium would be chargeable," and after his death the insurance money was paid to the defendant, the plaintiff joining in a release to the company. In this action the plaintiff, as the administrator of the estate of the daughter Isabelle, seeks to recover one third of this money.

The first question is whether the rights of the parties to this action are to be determined by the law of New York or of this State. At the time of the application and thereafter, Mr. Brayton and his wife were continually residents of this State. The application was made in this State, to the duly authorized agent of the company in this State, who forwarded the same to the home office, in the city of New York, where it was accepted, and the policy was sent by the company to its agent in this State, and by him here delivered. It does not appear that any notice was given of the acceptance until the policy was delivered in this State. In the application the beneficiary was the wife alone, while in the policy as sent by the company she was not the only beneficiary. The policy was not to be delivered until the premium was paid. The contract was not made until the policy as changed was delivered to Mr. Brayton, and the premium paid. The case is clearly distinguishable from *Commonwealth Ins. Co. v. Knabe & Co. Mfg. Co.*, 171 Mass. 265, upon which the plaintiff relies. The contract was made in this State, and the rights of the parties, so far as involved in this suit, must be settled by the law of this State, notwithstanding the stipulation in the policy that the premiums and the sum insured were to be paid in the State of New York. *Thwing v. Insurance Co.*, 111 Mass. 109; *Markey v. Insurance Co.*, 126 Mass. 158; *Society v. Clements*, 140 U. S. 226. See also *Insurance Co. v. Phinney*, 178 U. S. 327; *Hamlyn v. Talisker Distillery*, [1894] App. Cas. 202; *Jacobs v. Credit Lyonnais*, 12 Q. B. Div. 589; *Insurance Co. v. Cohen*, 179 U. S. 262.

ANDREWS v. POND.

SUPREME COURT OF THE UNITED STATES. 1839.

[Reported 13 *Peters*, 65.]

TANEY, C. J.¹ This case comes before the court upon a writ of error, directed to the judges of the Circuit Court for the Ninth Circuit and Southern District of Alabama.

The action was brought by the plaintiff as indorsee, against the defendants as indorsers of a bill of exchange in the following words:—

“NEW YORK, March 11, 1837.

“Exchange for \$7287⁷⁸/₁₀₀.

“Sixty days after date of this first of exchange, second of same tenour and date unpaid, pay to Messrs. Pond, Converse, and Wadsworth, or order, seven thousand two hundred and eighty-seven ⁷⁸/₁₀₀ dollars, negotiable and payable at the Bank of Mobile, value received, which place to the account of

“Your obedient servant

“To Messrs. Sayre, Converse & Co., }
Mobile, Alabama.” }

“D. CARPENTER.”

The case, as presented by the record, appears to be this. The defendants were merchants, residing in Mobile, in the State of Alabama. H. M. Andrews & Co. were merchants residing in New York; and before the above-mentioned bill was drawn, the defendants had become liable to H. M. Andrews & Co. as indorsers upon a former bill for \$6,000, drawn by E. Hendricks on Daniel Carpenter, of Montgomery, Alabama. The last-mentioned bill was dated at New York, and fell due on the 21st of February, 1837, and was protested for non-payment.

The defendant Pond, it seems, was in New York in the month of March, 1837, shortly after this protest; when H. M. Andrews & Co. threatened to sue him on the protested bill: and the defendant Pond, rather than be sued in New York, agreed to pay H. M. Andrews & Co. ten per cent damages on the protested bill, and ten per cent interest and exchange on a new bill to be given, besides the expenses on the protested bill.

According to this agreement, an account, which is given in the record, was stated between them on the 11th of March, 1837, in which the defendants were charged with the protested bill and ten per cent damages on the protest, and interest and expenses, which amounted altogether to the sum of \$6,625.25, and ten per cent upon this sum was then added, as the difference of exchange between Mobile and New York, which made the sum of \$7,287.78; for which the defendant Pond delivered to H. M. Andrews & Co. the bill of exchange upon which

¹ Part of the opinion only is given. — ED.

this suit is brought, indorsed by the defendants in blank. The bill was remitted by H. M. Andrews & Co. to S. Andrews, at Mobile, for collection. The drawees refused to accept it, and it was protested for non-acceptance; and after this refusal and protest it was transferred by S. Andrews to J. J. Andrews, the present plaintiff. It is stated in the exception, that after this transfer it was a cash credit in the account between H. M. Andrews & Co. and S. Andrews. The bill was not paid at maturity, and this suit is brought to recover the amount.

There is no question between the parties as to the principal or damages of ten per cent charged for the protested bill of \$6,000; nor as to the interest and expenses charged in the account herein before mentioned. The defendants admit that the principal amount of the protested bill, the damages on the protest which are given by the act of Assembly of New York, and the interest and expenses, were properly charged in the account. The sum of \$6,625.25 was therefore due from them to H. M. Andrews & Co. on the day of the settlement, payable in New York. The dispute arises on the item of \$662.53, charged in the account as the difference of exchange between New York and Mobile, and which swelled the amount for which the bill was given to \$7,287.78. The defendants allege that the ten per cent charged as exchange was far above the market price of exchange at the time the bill was given, and that it was intended as a cover for usurious interest exacted by the said H. M. Andrews & Co. as the price of their forbearance for the sixty days given to the defendants. This was their defence in the Circuit Court, where a verdict was found for the defendants under the directions given by the court.

Many points appear to have been raised at this trial, which are stated as follows, in the exception taken by the plaintiff.

The defendant offered evidence, —

1. To prove that the said bill of exchange was usurious, according to the statute and laws of the State of New York. The plaintiff objected to the reading of the statute and depositions aforesaid, because the contract was not made with a view of the statute or laws of New York. But the bill of exchange was usury or not by the laws and statutes of Alabama; and that the contract was subject only to the laws of the State of Alabama, as to its obligatory force and validity; and he further objected, that if this contract were to be decided by the statute of New York, that this proof could not be given under this issue; but the court overruled all these objections, and permitted the depositions and statute to be read, to show the bill of exchange to be void by the laws of New York: to all which plaintiff excepts. . . .

Plaintiff moved the court to charge the jury that the contract expressed in this bill of exchange, if to be executed in Alabama, was subject alone to the laws of Alabama against usury; and that the usury laws of New York had no force, or anything to do with this investigation. This was refused by the court, and plaintiff excepts. . . .

Upon the whole case, and the several points stated, the court charged

the jury that . . . if they believed from the evidence that the drawers of the bill of exchange contracted with the drawee in the State of New York, at the time the bill was drawn, for a greater rate of interest than seven per centum per annum, for the forbearance of the payment of the sum of money specified in the bill, although it may have been taken in the name of exchange, the contract is usurious; and unless they believe from the evidence that the plaintiff took the bill in the regular course of business, and upon a fair and valuable consideration *bona fide* paid by him, and without notice of the usury, they ought to find for the defendants, otherwise for the plaintiff. . . .

Another question presented by the exception, and much discussed here, is, whether the validity of this contract depends upon the laws of New York or those of Alabama. So far as the mere question of usury is concerned this question is not very important. There is no stipulation for interest apparent upon the paper. The ten per cent in controversy is charged as the difference in exchange only, and not for interest and exchange. And if it were otherwise, the interest allowed in New York is seven per cent, and in Alabama eight; and this small difference of one per cent per annum upon a forbearance of sixty days could not materially affect the rate of exchange, and could hardly have any influence on the inquiry to be made by the jury. But there are other considerations which make it necessary to decide this question. The laws of New York make void the instrument when tainted with usury; and if this bill is to be governed by the laws of New York, and if the jury should find that it was given upon a usurious consideration, the plaintiff would not be entitled to recover, unless he was a *bona fide* holder, without notice, and had given for it a valuable consideration; while by the laws of Alabama he would be entitled to recover the principal amount of the debt, without any interest.

The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury. And in the case before us, if the defendants had given their note to H. M. Andrews & Co. for the debt then due to them, payable at Mobile, in sixty days, with eight per cent interest, such a contract would undoubtedly have been valid, and would have been no violation of the laws of New York, although the lawful interest in that State is only seven per cent. And if in the account adjusted at the time this bill of exchange was given it had appeared that Alabama interest of eight per cent was taken for the forbearance of sixty days given by the contract, and the transaction was in other respects free from usury, such a reservation of interest would have been valid and obligatory upon the defendants, and would have been no violation of the laws of New York.

But that is not the question which we are now called on to decide.

The defendants allege that the contract was not made with reference to the laws of either State, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due, and that it was concealed under the name of exchange, in order to evade the law. Now if this defence is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute? Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last-mentioned cases the agreements were permitted by the *lex loci contractus*, and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere; and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine.

In the case of *De Wolfe v. Johnson*, 10 Wheat. 383, this court held that the *lex loci contractus* must govern in a question of usury, although by the terms of the agreement the debt was to be secured by a mortgage on real property in another State. And the case of *Dewar v. Shaw*, 3 T. R. 425, shows with what strictness the English courts apply their own laws against usury to contracts made in England. In the case under consideration, the previous debt for which the bill was negotiated was due in New York; a part of it, that is to say, the damages on the protest of the first bill, were given by a law of that State, and the debt was then bearing the New York interest of seven per cent, as appears by the account before referred to. And, if in consideration of further indulgence in the time of payment, the parties stipulated for a higher interest, and agreed to conceal it under the name of exchange, the validity of the instrument, which was executed to carry this agreement into effect, must be determined by the laws of New York, and not by the laws of Alabama.

In this aspect of the case another question arose in the trial in the Circuit Court. By the laws of New York, as they then stood, usury was no defence against the holder of a note or bill who had received it in good faith, and to whom it was transferred for a valuable consideration and without notice of the usury. The present plaintiff claims the benefit of this provision; but upon the evidence in the case it is very clear that he does not bring himself within it. The bill of exchange was protested for non-acceptance while it was in the hands of S. Andrews, the agent of H. M. Andrews & Co., to whom it had been sent for collection; and this fact appeared on the face of the bill at the time it was transferred to the plaintiff. Now, a person who takes a bill, which

upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. There can be no distinction in principle between a bill transferred after it is dishonored for non-acceptance, and one transferred after it is dishonored for non-payment; and this is the rule in the English courts, as appears by the case of *Crossley v. Ham*, 13 East, 498. Now it is evident that no consideration passed between Carpenter, the drawer of the bill, and the defendants, who are the payers and indorsers. The bill was made and indorsed by the defendants for the purpose of being delivered to H. M. Andrews & Co., in execution of the agreement for further indulgence. And if that agreement was usurious, then the bill in question was tainted in its inception, and that taint must continue upon it in the hands of the present plaintiff.¹

BROWN v. NEVITT.

HIGH COURT OF ERRORS AND APPEALS, MISSISSIPPI. 1854.

[Reported 27 Mississippi, 801.]

HANDY, J.² This was a bill filed in the Southern District Chancery Court by James Brown, appellant, against John B. Nevitt, to foreclose a mortgage of real and personal property, executed by Nevitt to

¹ By the prevailing doctrine, where a contract is made in one jurisdiction to pay money in another, and the contract is usurious by the law of one jurisdiction and good by that of the other, the parties are said to be permitted to choose the one or the other law to govern their obligation, provided they do so *bona fide*; and they are presumed to have chosen that law which sustains the contract. *Junction R. R. v. Ashland Bank*, 12 Wall. 226; *Andruss v. People's B. & L. Assoc.*, 94 Fed. 575; *Dygert v. Vermont L. & T. Co.*, 94 Fed. 913; *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 173 (cf. *Smith v. Muncie Nat. Bank*, 29 Ind. 158); *Brown v. Freeland*, 34 Miss. 181; *Coad v. Home Cattle Co.*, 32 Neb. 761, 49 N. W. 757; *Townsend v. Riley*, 46 N. H. 300; *U. S. S. & L. Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006; *Thornton v. Dean*, 19 S. C. 583; *Sharp v. Davis*, 7 Baxt. 607; *Fisher v. Otis*, 3 Chand. 83. If, however, the place of performance is not *bona fide* agreed upon, but is named as a means of evading the usury laws of the place of contracting, the contract is usurious. *Nat. Mut. B. & L. Assoc. v. Burch* (Mich.), 82 N. W. 837; *Meroney v. Atlanta N. B. & L. Assoc.*, 112 N. C. 842, 17 S. E. 637. See *McAllister v. Smith*, 17 Ill. 328.

In some jurisdictions, however, greater stress is laid on the law of the place of performance; and a contract good by the law of the place of contracting but void by that of the place of performance is held invalid, unless the parties are shown to have intended otherwise. *Jackson v. Amer. Mtg. Co.*, 88 Ga. 756, 15 S. E. 812; *Odum v. N. E. Mtg. Sec. Co.*, 91 Ga. 505, 18 S. E. 131; *Underwood v. Amer. Mtg. Co.*, 97 Ga. 238, 24 S. E. 847; *Dickinson v. Edwards*, 77 N. Y. 578. (See *Sheldon v. Haxtun*, 91 N. Y. 124). — Ed.

² Part of the opinion only is given. — Ed.

Brown, to secure a debt amounting to \$32,500, and interest, consisting of several notes made by Nevitt to Brown, one for the sum of \$4,833.33 $\frac{1}{2}$, two for the sum of \$10,833.33 $\frac{1}{2}$ each, all bearing interest at the rate of eight per centum per annum from their date, also two drafts drawn by Nevitt on Samuel Nicholson, agent for Brown, amounting to the sum of \$6,000, all bearing the same date of the mortgage, and being payable at future days. The bill states that the first note and the two drafts had been paid, and claims that there was due on the two notes for \$10,833.33 $\frac{1}{2}$, a balance of principal and interest of about \$23,879.60, and seeks a foreclosure.

The answer of Nevitt denies his indebtedness to the amount claimed in the bill, and alleges that the contract sought to be enforced against him is usurious, unlawful, and against the form of the statute in such case made and provided, and was made under the following circumstances: That Nevitt agreed with Nicholson, agent of Brown, that Brown should lend and advance to him the sum of \$32,500, on a credit of one, two, and three years, in equal annual instalments, to be secured by mortgage and to bear interest at the rate of eight per cent per annum from the date of the transaction; that \$10,000 of this amount was to be advanced by Brown, by causing a credit for that sum to be entered for Nevitt on the books of the Planters' Bank at Natchez, and the sum of \$16,500 of the money advanced was to be by a credit to that amount to be entered for Nevitt on the books of the Commercial Bank of Rodney; and the residue of said amount, \$6,000, was to be advanced in cash to Nevitt on the 1st of January thereafter; that the credits were accordingly given on the books of the banks, and the sum of \$6,000 was paid in cash, but that although the credits received on the books of the banks were at their nominal amounts, they were, at the time they were received, at a depreciation of twenty or twenty-five per cent below lawful money; that the notes and mortgage were executed for the credits so given, in part as for a loan and advance of so much money by Brown to Nevitt, and with the intention to require a greater rate of interest than was allowed by our laws. . . . It is insisted in behalf of the appellant, that as these notes were made payable in Louisiana, they are to be governed by the law of that State; and as it is not shown that the contract was usurious by the law of that State, that it cannot be held to be usurious under our laws. This argument would have much force if the objection to this transaction was merely that a rate of interest not permitted by our laws, but allowable by the laws of Louisiana, was claimed or charged *bona fide*, and not with the view of evading our laws upon the subject; for in such a case, the law of the place of performance of the contract would govern it. But a much more serious objection is raised to this contract. The usury is alleged to consist, not in the stipulation for a rate of interest upon a legal loan not allowed by our laws, though legal in the State of Louisiana, but in loaning or selling depreciated bank securities as if they were worth their nominal value, by means of which an illegal rate of interest and a usurious

profit upon the real value loaned or sold would be realized. The objection is, that the consideration of the contract is illegal, because the appellant thereby reserved, as a component part of the principal sum intended to be secured, a usurious rate of interest upon the sum advanced, this being inherent in the transaction, and necessarily governed by the laws of this State, where it was actually done. Such a transaction is held to be prohibited by our laws, as is above shown; and it cannot stand on the same principles with a *bona fide* agreement made in one place, to be executed in another. We cannot recognize the laws of Louisiana as rendering valid a contract made here and sought to be enforced here, which is prohibited by our laws. The rule in such cases is, that the agreement must stand or fall by the law of the place where it was made. *Andrews v. Pond et al.*, 13 Pet. 65; *Story, Conf. Laws*, 203.

Here the defendant alleges that a usurious interest and profit were intended to be secured to the appellant, by means of the advance of bank credits to the amount of \$26,500, as at par, when they were at a depreciation of from twenty to thirty per cent, retaining upon the nominal amount interest at the rate of eight per cent per annum from the date. And these allegations are sustained by the evidence. It is shown that the appellant's agent, who conducted the negotiation, was well aware of the depreciation of the bank funds, and of Nevitt's great desire to procure them; that he would not transfer the sterling bonds, which were somewhat more valuable than the general bank credits, and were the kind of funds which he knew that Nevitt especially desired to purchase, and that he insisted that the bank credits should be received by Nevitt at par; that all the efforts of Nevitt to obtain the funds and advances on better terms were unavailing; that he had to come to Nicholson's terms, take a smaller advance of acceptances than he desired, take the bank debt at par, and pay interest at the rate of eight per cent upon the whole amount. These circumstances show that by the giving time of payment on the notes of Nevitt, an interest and profit were intended to be secured, contrary to the law of this State, and which cannot be carried into execution by our courts.

AKERS v. DEMOND.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[Reported 103 *Massachusetts*, 318.]

WELLS, J.¹ The defence to this suit is, that the bills of exchange are void for usury, under the laws of New York, where they were first negotiated. The statute of New York, Rev. Sts. part 2, c. 4, tit. 3, § 5,

¹ Part of the opinion only is given. — Ed.

declares such securities void "whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken," a greater rate of interest than seven per cent. The Superior Court ruled that, upon the testimony offered, no defence was established, and instructed the jury to return a verdict for the plaintiffs. . . .

The testimony . . . tends to prove that the bills in suit were drawn by Reed and indorsed by William H. Russell, the payee, in New York, and accepted by the defendant in Boston, being upon their face addressed to him there. Both the acceptance and the indorsement were for the accommodation of Reed. The possession of collateral security, whether subsequent or at the time, does not change the character of the acceptance or the relations of the parties. *Dowe v. Schutt*, 2 Denio, 621. After the return of the acceptances to Reed, by an arrangement between him and the nominal payee, the latter procured the bills to be discounted by the plaintiffs, at the rate of one and a half per cent a month. The proceeds of one of the bills were retained by William H. Russell, the payee, as a loan from Reed, and the proceeds of the other handed over by him to Reed.

As the case is now presented, in the absence of controlling testimony on the part of the plaintiffs, the foregoing statement must be taken as the result of the evidence. It shows that the transaction by which the plaintiffs became holders of the bills was the original negotiation of the paper; a loan upon discount, and not a mere sale of the bills. They are therefore open to the defence of usury. This is so clearly shown to be the law of New York, by the decisions of the courts of that State referred to in *Ayer v. Tilden*, 15 Gray, 178, as to require no further citations.

The defendant is entitled to set up the usury, although not paid by himself, and although the loan was not made to him nor on his account. *Van Schaack v. Stafford*, 12 Pick. 565; *Duncomb v. Bunker*, 2 Met. 8; *Cook v. Litchfield*, 5 Seld. 279; *Clark v. Sisson*, 22 N. Y. 312.

The difficult question in the case arises from the fact that the paper was made payable in Boston. It is contended that the contract of the acceptor is to be governed by the laws of the place where the bills are made payable. The general principle is, that the law of the place of performance is the law of the contract. This rule applies to the operation and effect of the contract, and to the rights and obligations of the parties under it. But the question of its validity, as affected by the legality of the consideration, or of the transaction upon which it is founded, and in which it took its inception as a contract, must be determined by the law of the State where that transaction was had. No other law can apply to it. Usury, in a loan effected elsewhere, is no offence against the laws of Massachusetts. In a suit upon a contract founded on such a loan, the penalty for usury could not be set up in defence, under the statutes formerly in force in this Commonwealth. Neither can a penalty, as a partial defence, authorized by the laws of one State, be applied or made effective in the courts of another State.

Gale v. Eastman, 7 Met. 14. Such penal laws can be administered only in the State where they exist. But when a usurious or other illegal consideration is declared by the laws of any State to be incapable of sustaining any valid contract, and all contracts arising therefrom are declared void, such contracts are not only void in that State, but void in every State and everywhere. They never acquire a legal existence. Contracts founded on usurious transactions in the State of New York are of this character. *Van Schaack v. Stafford*, 12 Pick. 565; *Dunscomb v. Bunker*, 2 Met. 8. The fact that the bills now in suit were accepted in Boston and were payable there does not exempt them from this operation of the laws of New York. They were mere "nude pacts," with no legal validity or force as contracts, until a consideration was paid. The only consideration ever paid was the usurious loan made by these plaintiffs in New York. That then was the legal inception of the alleged contracts. *Little v. Rogers*, 1 Met. 108; *Cook v. Litchfield*, 5 Seld. 279; *Clark v. Sisson*, 22 N. Y. 312; *Aeby v. Rapelye*, 1 Hill, 1. By the statutes of New York, that transaction was incapable of furnishing a legal consideration; and, so far as the bills depend upon that, they are absolutely void. The original validity of such a contract must be determined by the law of the State in which it is first negotiated or delivered as a contract. *Hanrick v. Andrews*, 9 Port. 9; *Andrews v. Pond*, 13 Pet. 65; *Miller v. Tiffany*, 1 Wall. 298; *Lee v. Selleck*, 33 N. Y. 615.

There is no pretence that a discount of one and a half per cent a month was justifiable by reason of any added exchange between New York and Boston; nor that it was otherwise than usurious, if any amount of charge upon paper payable elsewhere than in New York would be usurious there. It has often been held, in States where restrictions upon the rate of interest are maintained, that it is not usury to charge upon negotiable paper whatever is the lawful rate of interest at the place where the paper is payable, although greater than the rate allowable where the negotiation takes place. But if the paper is so made for the purpose of enabling the larger rate to be taken, or the greater rate is received with intent to evade the statutes relating to usury, and not in good faith as the legitimate proceeds of the contract, it is held to be usury. So also, if a greater rate is taken than is allowed by the law of either State, it is usury. Such a rate necessarily implies an intent to disregard the statutes restricting interest. *Andrews v. Pond*, 13 Pet. 65; *Miller v. Tiffany*, 1 Wall. 298. The legal rate of interest or discount in Massachusetts is six per cent per annum; and, at the date of the negotiation of these bills, a greater rate than six per cent was usurious and unlawful.

It follows, from these considerations, that, upon the evidence as it now stands upon the part of the defendant, the transaction, upon which alone the bills in suit must depend for a consideration to give them validity as contracts, was illegal, and such as, under the laws of New York, renders them utterly void. No action, therefore, can be main-

tained upon them in the courts of Massachusetts, unless the effect of this evidence be in some way overcome or controlled. The verdict for the plaintiff must be set aside, and a *New trial granted.*¹

SCOTT v. PERLEE.

SUPREME COURT OF OHIO. 1883.

[*Reported 39 Ohio State, 63.*]

DOYLE, J. The findings and judgment of the court, where a case is tried without the intervention of a jury, will not be disturbed by this court, unless such findings and judgment are clearly against the weight of the evidence. In the present case, the testimony, beyond what appears upon the face of the note, consists solely of that given by the two parties, Scott and Perlee. Which of them was to be believed, was a matter properly to be determined by the court trying the case, and if the judgment can fairly be sustained upon the testimony of either, it ought not to be reversed. *Landis v. Kelly*, 27 Ohio St. 571.

The court might well find from this testimony, if the plaintiff was believed, that in the summer of 1870, the plaintiff was in Fairbury, Illinois, where the defendant, Andrew J. Scott, resided; that the latter, desiring money to carry on some building enterprises in which he was engaged, in Illinois, applied to the plaintiff, who was his brother-in-law and visiting him at the time, for a loan, agreeing to pay him therefor ten per cent interest; that the plaintiff agreed to make the loan upon the terms named, upon defendant's note, with Henderson W. Scott, who lived in Ohio, as surety, and that without any further arrangement Scott wrote the note at Fairbury, at which place he dated and signed it; that it was then sent to Ohio to the surety, who signed it and delivered it to the payee, receiving the money in this State and forwarding it to the principal, and that the parties intended in good faith, to contract with reference to the law of Illinois, as to the rate of interest to be paid for the use of the money.

The question presented for our consideration therefore is, whether such a contract, thus made, is usurious? That this contract was executed in Ohio may be conceded; although signed in Illinois by the principal debtor and there dated, it was delivered in Ohio and was not a completed contract until delivery. The fact that the loan was negotiated

¹ In several jurisdictions a note invalid for usury where made is void, without regard to the law of the place of payment. *Falls v. Savings Co.*, 97 Ala. 417; *Astor v. Price*, 7 Mart. n. s. 408; *Atwater v. Walker*, 16 N. J. Eq. 42; *Maynard v. Hall*, 92 Wis. 565, 66 N. W. 715.

In most jurisdictions a contract good where made will not be affected by the usury laws of the place of payment. *Sturdivant v. Bank*, 60 Fed. 730; *Amer. Freehold M. Co. v. Sewell*, 92 Ala. 163; *Pine v. Smith*, 11 Gray, 38; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. 713. — Ed.

for in Illinois in accordance with the written terms of the note, is not insignificant, however, in determining the intention of the parties to contract with reference to Illinois law. *Findlay v. Hall*, 12 Ohio St. 612. It is then, the case of a citizen of Illinois executing his note in Ohio, in pursuance of an arrangement previously made in Illinois, for money borrowed to be used in the latter State, with an agreement to pay interest according to her laws, not intending or attempting thereby to evade our usury laws, but in good faith. Is such a contract tainted with usury?

Since the cases of *Findlay v. Hall*, 12 Ohio St. 610, and *Kilgore v. Dempsey*, 25 Ohio St. 413, it is undoubtedly the law of this State, and indeed it is now well established almost universally, that where a contract is entered into in one State, to be performed in another, between citizens of each, and the rate of interest is different in the two, the parties may, in good faith, stipulate for the rate of either, and thus expressly determine with reference to the law of which place that part of the contract shall be decided. Where such a contract, in express terms, provides for a rate of interest lawful in one but unlawful in the other State, the parties will be presumed to contract with reference to the laws of the State where the stipulated rate is lawful, and such presumption will prevail until overcome by proof that the stipulation was a shift to impart validity to a contract for a rate of interest, in fact usurious. *Fisher v. Otis*, 3 Chandler, 102; *Butters v. Old*, 11 Iowa, 1; *Arnold v. Potter*, 22 Iowa, 198; *Newman v. Kershaw*, 10 Wis. 340; *Horsford v. Nichols*, 1 Paige, Ch. 225; *Townsend v. Riley*, 46 N. H. 300; *Depau v. Humphreys*, 20 Mart. (La.) 1; *Fanning v. Consequa*, 17 Johns. 511; *Pratt v. Adams*, 7 Paige, 615; *Chapman v. Robertson*, 6 Paige, 627; *Richards v. Globe Bank*, 12 Wis. 696.

If the parties to the note in question had expressly stipulated in the note that it was payable in Illinois, the contract to pay ten per cent interest would be perfectly valid, although the note was executed in Ohio. Is it rendered invalid by reason of the omission to make that express stipulation? It is not entirely settled by the authorities where this note, as a matter of interpretation, is payable, there being no place expressly stipulated; but the weight of authority and the sounder reason, we think, sustain the proposition, that a note dated and signed at the place of residence of the debtor, and containing stipulations, lawful under the laws of such place, but forbidden by the law of the residence of the creditor, or where the note was completed by delivery and no other place of payment is named, will be presumed to be payable at the former place, assuming of course that no attempted evasion of the usury law of the latter is proved. In other words, in the absence of any proof the presumption of law is that the note in question is an Illinois contract, and is valid both as to principal and interest. To overcome this presumption the actual facts may be shown. It is shown that the contract was delivered in Ohio; but, taken in connection with the other facts proved, that does not overcome the presumption that it

is payable in Illinois, where the debtor resides, where he dated and signed his contract, and where alone it is legal according to all of its terms. 2 Parsons on Contracts, 584, and cases cited; Daniels' Neg. Inst. § 90; Arnold v. Potter, 22 Iowa, 198; Tillottson v. Tillottson, 34 Conn. 336; Jewell v. Wright, 30 N. Y. 264. Where such express stipulation would uphold the contract, if the same thing can fairly be inferred from what is stipulated, it will likewise be upheld.

But, while we believe that this contract can be thus sustained, it is not necessary to place the decision upon that ground. There is no reason why a citizen of Illinois, or any other State, may not come into Ohio and borrow money to be used in the State of his residence, and in good faith contract with reference to the laws of the latter State, independently of where his note is executed or where it is legally presumed to be payable. In such case the only question is one of good faith. Did he honestly contract with reference to the law of his allegiance, the law of the State or country where he lives?

In Arnold v. Potter, 22 Iowa, 194, the note was made by a citizen of Iowa, in Massachusetts, payable in New York, and the court instructed the jury that "If defendant went to Boston and urged the loan and promised ten per cent under the laws of Iowa, and all the arrangements and contracts were made as to the laws of Iowa, in good faith, then the defence fails and plaintiff can recover. If the parties in good faith loaned and borrowed the money sued for with a full understanding that the law of Iowa was to govern as to the interest, then the laws of New York and Massachusetts can have no influence, but the understanding of the parties must prevail." The Supreme Court in affirming this charge say: "The form of the transaction is nothing, the cardinal inquiry being when the contract specifying the amount reserved is express, did the parties resort to it as a means of disguising the usury in violation of the laws of the State where the contract was made or to be executed, and in arriving at this intention all of the facts are to be taken into consideration."

It is true that in this case, like Chapman v. Robertson, *supra*, security was given by mortgage upon lands in the State of the debtor's residence, but the fact that security is given for a note does not alter the terms of the note. But such fact has significance in determining what the intention of the parties was, as to the laws of which State their contract had reference, or by which it was to be construed. Newman v. Kershaw, 10 Wis. 341; Fisher v. Otis, 3 Chandler, 83; Horsford v. Nichols, 1 Paige, Ch. 225; 2 Kent, Com. 12 ed. 460, bottom p. 623. It is a fact of no greater significance than is found in this case, where the borrower actually negotiated for the loan in the State of his residence, dated his note there, and stipulated for interest allowed by her laws. See Horsford v. Nichols, *supra*; 10 Wis. 340.

In a recent case, Kellogg v. Miller, 13 Fed. Rep. 198, decided by McCrary, C. J., in the Circuit Court of Nebraska, he held, upon a state of facts very like those recited in this case, except that there was a

mortgage security, that the contract was valid upon both grounds assumed in this opinion, first, because the contract was to be performed in Nebraska, and second, the ground we are now considering, "A citizen of one State may loan money to a citizen of another State, and contract for the rate of interest allowed by the laws of the latter State, although the legal rate of interest allowed is greater in such State than in the State where the contract is made, and in which it is to be performed." See also *Tilden v. Blair*, 21 Wall. 241, and comments thereon of *Folger, J.*, in 77 N. Y. 580, that the ruling consideration of that case was the intention of the parties, that the draft should be used in Illinois, as a contract of that State, although accepted and payable in New York. *Wayne Co. Savings Bk. v. Low*, 6 Abb. N. C. 76, 95, *aff'd* 81 N. Y. 569; 2 Kent, Com. 12 ed., bottom p. 622-625, and note; *Vliet v. Camp*, 13 Wis. 208. Indeed these cases are but applications of the rule as given by Lord Mansfield. "The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." *Robinson v. Bland*, 2 Burr. 1078. The place of making the contract is not to be so exclusively regarded, but that when the contracting parties had reference to another place that may be regarded; that is, the intention of the parties shall govern when it is made manifest. *Fisher v. Otis*, *supra*. That the parties here entered into this contract in good faith with reference to the laws of Illinois, there can be no doubt. The law of Ohio never entered into the transaction so far as the intention of the parties can be ascertained. There was no intention to make an illegal contract; and to hold it illegal, we must be able to say that the mere fact that Scott forwarded this note to his surety for his signature, and that it was signed and delivered by the surety in Ohio, and the money there paid (more than probably as a mere matter of convenience), has the effect of defeating the intention of the parties. It is difficult to perceive upon what principle we should so find.

We do not in thus holding encourage two citizens of Ohio to attempt to contract here for money to be used here, and make their notes payable in another State; nor in any way relax the strictness of the rules which prevent any form of evasion of the law against usury; but we hold that it is not repugnant to such law for a person to contract with reference to the law of his domicil, for money to be used there, where no such evasion is sought or intended.

*Judgment affirmed.*¹

¹ *Acc. Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024. *Contra, Amer. Freehold L. & M. Co. v. Jefferson*, 69 Miss. 770, 12 So. 464 (*semble*); *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141. — ED.

BIGELOW v. BURNHAM.

SUPREME COURT OF IOWA. 1891.

[*Reported 83 Iowa, 120.*]

BECK, C. J. The promissory note is in the following language :

“STORM LAKE, BUENA VISTA CO., IOWA.

“For value received I promise to pay Rufus Burnham or bearer eighteen hundred and fifty-eight dollars and sixty-three cents, within one year from date, with interest at seven per cent. May 2, 1885.

“ROLLIN BURNHAM.”

The answer of the defendant admits the execution of the note in suit, but alleges that it was executed and delivered in the State of New York, and that under the laws of that State it is usurious and void. The statutes of New York declare that all notes and other contracts, providing for the payment of interest at a rate greater than six per centum per annum, shall be void. The evidence shows that the note in suit was signed in New York, and delivered there, and that the plaintiff at the time, and both prior and subsequently thereto, resided, and still does reside, in Storm Lake, in this State, and the payee of the note resided in New York. It is not shown where the indebtedness was incurred for which the note was given, nor where the consideration therefor was delivered to and received by the plaintiff, nor was there any evidence showing an agreement for the payment of the note at any specified place. The only facts upon which the case was decided are that the note was executed in New York, and that the payee resided in that State.

It is a settled rule that the law of the place where a contract or a note by its terms is to be performed determines the question of its validity. *Butters v. Olds*, 11 Iowa, 1 ; *Arnold v. Potter*, 22 Iowa, 194 ; *Burrows v. Styker*, 47 Iowa, 477 ; *Story on Conflict of Laws*, §§ 242, 280, 281 ; *Andrews v. Pond*, 13 Pet. 65 ; 2 *Parsons on Notes and Bills*, 320.

The date and place of execution of a promissory note, which appear on its face, and not by mere memorandum entered thereon, raise the presumption that it is payable at that place. The reason of this rule is based upon the fact that the mention of the place is always intended to show that the note was executed there, just as the entry of the date is intended to show the day of execution. In business affairs, and the general affairs of life, the date of an instrument, and the place named in connection with the date, are written thereon, in order to show the day and place of its execution. The law will raise a presumption in accord with this uniform custom of men generally. The place named in a promissory note as the place of execution is usually the place of

residence or business of the maker of the paper, and is embodied in the note to show where it may be presented for payment. It follows that the law raises a presumption upon the face of the note of an agreement that it is payable at the place indicated as the place of its execution, and permits it to be enforced under the law prevailing there. 1 Parsons on Notes and Bills (1 ed.), 441, 442; Bullard v. Thompson, 35 Tex. 313; Orcutt v. Hough, 54 N. H. 472; Ricketts v. Pendleton, 14 Md. 320.

It will not do to presume that the parties entered into a contract, which is void under the laws of New York, and that they intended that it should be subject thereto. Such presumption would charge them with the folly or the fraud of entering, with their eyes open, into a void contract. Men are not presumed by the law to act in folly or in dishonesty, but rather that they intended in good faith that their acts shall be valid, and what they purport to be. Nor will we by presumption bring the case under the usury law of New York, which is penal in its effects. Bullard v. Thompson, 35 Tex. 313; Thompson v. Powles, 2 Sim. 194.

When a contract is made in one State, to be performed in another, and in express terms provides for a rate of interest lawful in one, but unlawful in the other State, the parties will be presumed to contract with reference to the laws of the State wherein the stipulated rate of interest is lawful, and such presumption will prevail until overcome by proof that the stipulation was intended as a means to defeat the law against usury, and to support a contract otherwise usurious. If it be a *bona fide* transaction the contract will be sustained; if a device for securing usurious interest it will be held invalid. Scott v. Perlee, 39 Ohio St. 63; Newman v. Kershaw, 10 Wis. 333; Fisher v. Otis, 3 Chand. (Wis.) 83; Richards v. Bank, 12 Wis. 692; Horsford v. Nichols, 1 Paige, 220; Pratt v. Adams, 7 Paige, 615; Fanning v. Consequa, 17 Johns. 511; Townsend v. Riley, 46 N. H. 300; Arnold v. Potter, 22 Iowa, 194; Butters v. Olds, 11 Iowa, 1. See note to Martin v. Johnson, 8 Lawyer's Rep. Ann. 170; 10 S. E. Rep. 1092.

It appears that the rule as to the law of contracts, made in one State to be performed in another, is modified or softened when applied to contracts for interest, so that the intentions of the parties are effectuated, as a concession to trade and commerce. See Daniels on Negotiable Instruments, § 922, and cases cited; 2 Parsons on Contracts, § 5, p. 94, and cases cited. Hart v. Wills, 52 Iowa, 56, is not in conflict with our conclusions in this case, the note in that case being held to be an Iowa contract upon grounds not inconsistent with our decision in this case.

On the ground that the note upon its face will be presumed to be payable in Iowa, and in accord with other doctrines stated, we reach the conclusion that the judgment of the District Court ought to be

Reversed.

FOWLER v. EQUITABLE TRUST COMPANY.

2. SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 141 *United States*, 384.]

By deed, bearing date November 1, 1873, and acknowledged and filed for record February 23, 1874, Edwin S. Fowler — his wife, Sophie Fowler, uniting with him — conveyed to Jonathan Edwards, in fee simple, certain real estate in the city of Springfield, Illinois, in trust to secure the payment of the principal and interest of nine bonds, of one thousand dollars each, executed by Fowler to the Equitable Trust Company, a Connecticut corporation, and payable, principal and interest, at its office in the city of New York; the principal, five years after date, and the interest, semi-annually, at the rate of seven per cent per annum. . . .

The present suit was brought, October 26, 1882, to foreclose the defendants' right and equity of redemption, and for a sale of the mortgaged property to raise such sum as might be due the mortgagee.

Fowler, by his answer, put the plaintiff upon proof of the averments of the bill, and made defence upon several grounds. But the original answer is important only as alleging that the loan was usurious, and was consummated in the manner it was with intent to evade the statutes of Illinois relating to interest.

The plaintiff filed a general replication; and subsequently the defendants, by leave of the court, amended their answer, stating more fully the grounds upon which they based the defence of usury. They also alleged that the contract of loan was and is a New York contract, and that by the statutes of that State it was usurious, in that the interest contracted to be received by the plaintiff, having regard to the amount actually advanced by it, was in excess of seven per cent per annum, the rate established by the laws of New York. Of those statutes they claimed the benefit.¹ . . .

By the final decree of January 11, 1887, the sum of \$8,150.79 was adjudged to be due the Trust Company, of which \$7,809.69 was found to be the sum actually advanced by it to Fowler, and \$341.10 was the amount of insurance and taxes on the property paid by the company, with interest on each sum, from the date of the decree, at the rate of six per cent per annum. The mortgaged property was ordered to be sold to raise the above aggregate amount found to be due, with such interest and the costs of the suit. From that decree each party has prosecuted an appeal; the defendants insisting that no decree, for any amount, should have gone against them, while the plaintiff insists that the decree should have been for a larger amount.

¹ Only so much of the case as deals with this point is given. Arguments of counsel are omitted. — ED.

HARLAN, J. The appellants Fowler and wife also contend that the contract of loan was a New York contract, and void under the laws of that State; and that neither the debt thus created, nor the mortgage given to secure the bonds, can be recognized, nor any recovery thereon had, in Illinois or elsewhere, for principal or interest. This contention rests upon the statute of New York, in force when the debt was created, providing that all bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatsoever, whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods, or things in action, than at the rate of seven per cent per annum shall be void. 1 Rev. Stats. N. Y. part 2, c. 4, title 3, § 5; vol. 2, 6th ed. (Banks & Brothers) 1164-6. The suggestion that by the contract of loan a rate of interest was reserved in excess of that allowed by the laws of New York, is based upon the ground that, although the bonds in suit call only for seven per cent interest, a much larger rate was, in fact, exacted and secured by the company, taking into consideration the amount of the loan, and the sum actually received under the contract.

By the thirteenth section of a statute of Illinois, in force on and after February 12, 1857, entitled "An act to amend the interest laws of this State," it was provided: "Where any contract or loan shall be made in this State, or between citizens of this State and any other State or country, bearing interest at any rate which was or shall be lawful according to any law of the State of Illinois, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other State or territory of the United States, or in the city of London, England; and in all such cases such contract or loan shall be deemed and considered as governed by the laws of the State of Illinois, and shall not be affected by the laws of the State or country where the same shall be made payable." Gross's Stats. Illinois, 1869, 371, c. 54, § 13.

And by another act, in force on and after February 16, 1857, entitled "An act for the encouragement and security of loans of money," it was provided: "§ 14. It shall be lawful for any person or corporation borrowing money in this State, to make notes, bonds, bills, drafts, acceptances, mortgages, or other securities for the payment of principal or interest, at the rates authorized by the laws of this State, payable at any place where the parties may agree; although the legal rate of interest in such place may be less than in this State; and such notes, bonds, bills, drafts, acceptances, mortgages, or other securities shall not be regarded or held to be usurious; nor shall any securities taken for the same, or upon such loans, be invalidated in consequence of the rate of interest of the State, kingdom, or country where the paper is made payable being less than in this State, nor of any usury or penal law therein. § 15. No plea of usury nor defence founded upon an allegation of usury shall be sustained in any court in this State, nor

shall any security be held invalid on an allegation of usury where the rate of interest reserved, discounted, or taken does not exceed that allowed by the laws of this State, in consequence of such security being payable in a State, kingdom, or country where such rate of interest is not allowed. § 16. It shall be lawful for all parties loaning money in this State, to take, reserve, or discount interest upon any note, bond, bill, draft, acceptance, or other commercial paper, mortgage, or other security, at any rate authorized by the laws of this State, whether such paper or securities for principal or interest be payable in this State, or in any other State, kingdom, or country, without regard to the laws of any other State, kingdom, or country; and all such notes, bonds, bills, drafts, acceptances, or other commercial paper, mortgages, or other security, shall be held valid in this State, whether the parties to the same reside in this State or elsewhere." Gross's Stats. Illinois, 1869, 372, c. 54.

These statutory provisions were in force at the time of the contract of loan involved in this case. And although the above acts of February 12, 1857, and February 16, 1857, were repealed by the act approved March 31, 1874, in force July 1, 1874, they remained in full force and effect as to rights acquired or causes of action existing under them, and before the repealing act went into operation. Rev. Stats. Illinois, 1874, pp. 1012, 1023, 1046, c. 131, § 5, paragraphs 297, and 299, and § 6. And by the act approved March 25, 1874, in force, July 1, 1874, entitled, "An act to revise the law in relation to the rate of interest," this provision of former acts was re-enacted and preserved: "When any bond, bill, draft, acceptance, mortgage, or other contract shall have been or shall be made in this State, or between citizens of this State, or a citizen of this State and any other State, territory, or country, bearing interest at a rate lawful by the laws of this State, may be made payable in any other State, territory, or country, such contracts shall be governed by the laws of this State." Rev. Stats. Illinois, 1874, 615, c. 74, § 8.

The contract of loan in question having been made between a citizen of Illinois and a corporation of another State, and the bonds having been executed in Illinois and secured by mortgage upon real estate there situated, the defence of usury, in a court of the United States, sitting in and administering the laws of Illinois, cannot be sustained upon the ground simply that the rate of interest, exacted or reserved, was in excess of that allowed by the law of the State in which the bonds are made payable. . . .

WAYNE COUNTY SAVINGS BANK *v.* LOW.

COURT OF APPEALS, NEW YORK. 1880.

[Reported 81 *New York*, 566.]

RAPALLO, J. In *Dickinson v. Edwards* (77 N. Y. 573), the decision in *Jewell v. Wright* (30 N. Y. 259) was adhered to, and it was held that where a promissory note was made in this State by a resident thereof, bearing date and, by its terms, payable in this State, with no rate of interest specified, and was delivered to the payees without consideration, to be used by them for their accommodation, without restriction, and was first negotiated by them in another State at a rate lawful there, but greater than that allowed by law in this State, it was usurious and void, there being no evidence in the case of any intention on the part of the maker that the note should be discounted or used out of this State.

That case, as well as *Jewell v. Wright*, was distinguished from *Tilden v. Blair* (21 Wall. 241) expressly upon the ground that in *Tilden v. Blair*, although the acceptance was made payable in New York by the acceptors, who were residents of New York, yet after having accepted in New York they returned the acceptance to the drawer in Illinois for the purpose and with the intention that it should be negotiated by him in that State. And this court says, in its opinion in *Dickinson v. Edwards* (77 N. Y. 573), that that was the controlling fact in *Tilden v. Blair*, and that the ruling consideration was the intention of the acceptors that the draft should be used in Illinois, while in *Jewell v. Wright*, and in the case then before the court, there was nothing to show an intent on the part of the maker of the note to give authority to deal with it otherwise than as the law of this State would allow.

The case of *Bank of Georgia v. Lewin* (45 Barb. 340) and other cases are distinguished from *Jewell v. Wright* on the same ground, and it may safely be said that the case of *Dickinson v. Edwards* rests upon the ground that there was no evidence of knowledge or intention on the part of the maker of the note that it was to be used out of this State, and that in the absence of such proof it must be governed by the law of the place of payment.

In the present case, the fact which was wanting in *Jewell v. Wright* and *Dickinson v. Edwards* clearly appears, and the case is brought within the principle of *Tilden v. Blair*, and the cases which have followed it. The note now in suit was dated and made payable in New York, but it was made for the express purpose of being used in renewal of another note for the same amount then held by the plaintiff, a bank in Pennsylvania. The note in suit was actually written in Pennsylvania, in the form in use in that State, by the cashier of the plaintiff, at the defendant's request, and forwarded by the cashier to the defendant for signature, and was signed by the defendant in New York, and then

mailed by him to the plaintiff in Pennsylvania, together with a check for the discount at the rate of eight per cent per annum, which was lawful in Pennsylvania. The note and interest were consequently received by the plaintiff in Pennsylvania, and all this was done in performance of a previous agreement which had been entered into in Pennsylvania between the plaintiff and the defendant. All that was done by the plaintiff in New York was simply in execution of that agreement, and, as is said in *Dickinson v. Edwards* (p. 580) in citing *Tilden v. Blair*, the designation of the place of payment of the note was an incidental circumstance, for the convenience of the maker, and not an essential part of the contract, or with the intent to affix a legal consequence to the instrument. It cannot be contended that a party who goes into another State, and there makes an agreement with a citizen of that State for the loan or forbearance of money, lawful by the laws of that State, can render his obligation void by making it payable in another State according to whose laws the contract would be usurious. Neither can it be claimed that because the obligation, instead of being signed in the State where the contract was made, is signed in another State and sent by mail to the place of the contract, it must be governed by the usury laws of the place where it was signed. The counsel for the appellant disputes the fact that the agreement for the giving of the note in suit in renewal of the \$2,000 note, which fell due, was made in Pennsylvania, but the findings and evidence clearly show that it was. The proposition for the renewal was made by the defendant at Honesdale, in writing, and there received by the plaintiff. In this proposition the defendant requested plaintiff's cashier to send defendant a new note to be signed, which the cashier did. The making of the new note by the cashier and forwarding it to the defendant for execution constituted a clear and definite acceptance of the proposition, and made the agreement to renew complete. The sending of the note and check by defendant signed were an execution of this completed agreement. He says he sent the check under a previous agreement. The appellant seeks on this appeal to set up a defence to the note in suit on the ground that the original \$10,000 note was an accommodation note, and was discounted in violation of the agreement under which it was loaned, and that the plaintiff did not give full value for it, \$2,000 of the proceeds of the discount having been applied to the payment of a precedent debt of the indorser. It is sufficient to say that the alleged facts on which this defence is based are not found by the referee, nor requested to be found, but that, on the contrary, the referee found that the \$10,000 note was discounted by the plaintiff for value in the ordinary course of business, and no exception was taken to this finding.

The judgment should be affirmed.

All concur.

*Judgment affirmed.*¹

¹ *Acc. Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638. In *Sands v. Smith*, 1 Neb. 108, it was held that a note made in Nebraska, and valid according to Nebraska law, was nevertheless usurious, according to the law of New York, since the agreement for the loan was made and the note was payable in New York. — ED.

GALE v. EASTMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1843.

[Reported 7 Metcalf, 14.]

ASSUMPSIT by the payee against the maker of a promissory note made and payable in New Hampshire. The defence was usury.¹

SHAW, C. J. By the law of New Hampshire, the contract, even though usury were taken or received upon it, was not void; it was so far legal, that an action might be maintained and a judgment recovered upon it, with certain deductions. Act of 12th Feb., 1791. By § 2, it is provided that when usury is relied upon, in defence, a special mode of trial may be offered by the defendant; that is, a trial by oath of the parties, as formerly practised under the law of Massachusetts, St. 1783, c. 55, but which mode of proof and form of trial are now altered in this State. By the law of New Hampshire, still in force, if the usury is thus proved, a certain amount shall be deducted, in assessing the damages, from the principal and interest due on the note. These provisions apply only to the remedy, and of course can extend only to suits brought in New Hampshire, and can have no effect when a remedy is sought under our laws. The general rule is, that those provisions of law which determine the construction, operation, and effect of a contract are part of the contract, and follow it, and give effect to it, wherever it goes; but that in regard to remedies, the *lex fori*, the law of the place where the remedy is sought, must govern. We therefore cannot be governed by the law of New Hampshire, which professes only to regulate the remedy on a usurious contract.

The law of Massachusetts, though somewhat analogous, cannot apply, because, although the mode of enforcing the law against usury is by applying it to the remedy, yet the law to be enforced is the law of Massachusetts. The law of this Commonwealth declaring what shall be the rate of interest, and what contracts shall be deemed usurious, also directs, when suits are brought, what deductions shall be made; but it is suits brought on such contracts, that is, contracts made in violation of its own provisions.

*Judgment for the plaintiff.*²

¹ This short statement is substituted for that of the Reporter. Arguments of counsel are omitted. — ED.

² *Acc. Sherman v. Gassett*, 9 Ill. 521; *Lindsay v. Hill*, 66 Me. 212; *Collins Iron Co. v. Burkam*, 10 Mich. 283; *Watriss v. Pierce*, 32 N. H. 560. See *Meares v. Finlayson*, 55 S. C. 105, 32 S. E. 986. — ED.

SECTION IV.

INTERPRETATION.

MULLEN v. REED.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1894.

[*Reported 64 Connecticut, 240.*]

TORRANCE, J.¹ In July, 1891, Joseph Mullen, domiciled in the town of Stafford in this State, died intestate, leaving the plaintiff as his widow, and one minor child. The plaintiff and the deceased intermarried prior to 1877, and said child is the issue of the marriage.

At the time of his death, Joseph Mullen was a member of "The Bay State Beneficiary Association" of Westfield, Massachusetts, a corporation organized under the laws of that State, "for the purpose of providing Benefit and Protection to its members and their families." He became a member thereof in 1882, while domiciled in the State of Massachusetts, where he and his family continued to reside for some years afterwards. By the certificate of membership issued to him by said association, he was constituted a member thereof; and in said certificate the association agreed "to pay to the 'heirs-at-law' of said member, in sixty days after due proof of the death of said member, a sum equal to the amount received from one death assessment, but not to exceed five thousand dollars."

Within sixty days after his death, said association paid to the defendant Reed, as the guardian of said minor child, the sum of five thousand dollars in full of the amount due under said certificate, and he now holds the same as such guardian. The present action was brought by the plaintiff, the widow of Joseph Mullen, against said guardian to recover a portion of said insurance money.

The defendant Reed demurred to the complaint because it did not appear therein "that the plaintiff is an heir-at-law of the said Joseph Mullen or that she is entitled to any part of said insurance money."

The court overruled the demurrer, and subsequently, after the administrator of Joseph Mullen had been cited in as a party, and "after a full hearing" no answer having been filed in the case, rendered judgment that the widow recover of the defendant Reed one third of the insurance money together with costs of suit.

From that judgment Reed, as guardian of the child, took the present appeal, alleging as reasons of appeal, that the court erred in overruling the demurrer, and in deciding that the plaintiff was entitled to one third of the money. It does not appear that the administrator makes

¹ Part of the opinion only is given. — Ed.

any claim to the insurance money or any part thereof, or that he took any part in this suit. There is really but one question before us upon this appeal, and that is whether the widow is entitled to one third of the insurance money.

By a written agreement signed by the counsel for both parties, filed in the court below after the present appeal was taken, and printed with the record, the plaintiff attempts to bring up the question whether the widow is or is not entitled to one-half rather than one-third of the insurance money, if she is entitled to any; but this agreement is no part of the record in any proper sense, and it nowhere appears upon the record, as required by the statute (§ 1135) that this question was raised on the trial below and decided adversely to the plaintiff. That question is therefore not properly before us, and for this reason we decline to consider it.

The question, then, is whether the widow is entitled to one third of the insurance money; and its solution depends upon the construction of the words "heirs-at-law" contained in the certificate of membership under which the money was paid over to the guardian of the minor child.

What do these words "heirs-at-law" mean in this certificate? Do they include or exclude the widow? Under these words the guardian claims the entire sum for the minor child, and the widow claims a share of it under the same words.

The question of course is, what was intended by these words at the time they were put into this certificate; and this is to be ascertained from the words used to express the intention, when read in the light of all the circumstances under which they were used. In ascertaining their meaning it must be borne in mind that the contract embodied in the certificate was made in Massachusetts, by parties domiciled or located there; that it was undoubtedly made with reference to the law of that State alone; and that both by its terms and by the understanding of the parties it was to be performed there. This being so, the general rule is that it should be construed and interpreted according to the laws of that State. *Smith v. Mead*, 3 Conn. 253; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Koster v. Merritt*, 32 Conn. 246. "For purposes of construction, it is always legitimate to consider the time when, and the circumstances in which, the will was made, and we think the law under which it was made is one of those circumstances." *Staigg v. Atkinson*, 144 Mass. 564. This principle is, we think, equally applicable to an instrument like this certificate.

We therefore think the words "heirs-at-law" in this instrument ought to be construed by us as they would be by the courts of Massachusetts, if this certificate was before them for construction upon this point; and as we understand the matter, the courts of that State, in cases where the words "heirs-at-law" are used in an instrument disposing of personal property alone, have quite uniformly construed them as meaning those persons who are entitled to take under the statute of distributions, unless there is something in the context to indicate a con-

trary intention. *Houghton v. Kendall*, 7 Allen, 72; *Sweet v. Dutton*, 109 Mass. 589; *White v. Stanfield*, 146 Mass. 424; *Kendall v. Gleason*, 152 Mass. 457. And not only this, but the courts of that State have held that the words "heirs-at-law," when used in such an instrument, indicated an intent that such persons are to take in the same manner and in the same proportions as if the property had come to them as intestate estate, unless a contrary intention appears. . . .

The result thus reached is also, we think, in accordance with the actual intent of Joseph Mullen, so far as the same can be ascertained from the certificate read in the light of the circumstances under which it was made, as they appear of record, and without reference to the rule we have been considering. The certificate is in the nature of a contract of insurance. The money to become due on it, under the laws of Massachusetts, Supp. to the Pub. Stat., p. 811, § 15, as appears of record, could not be taken by creditors, and it is fair to presume that this was known to the deceased at the time the certificate was issued. If so, there would be the further presumption that he thus intended to create a fund for the benefit of his family primarily, and not for the benefit of his creditors, or his estate; a fund that would go to the members of that family living at the time of his death, not as a part of his estate, but directly by force of the certificate.

He designated the class who were to take as beneficiaries, by the words "heirs-at-law;" and it is a fair presumption that he used those words for this purpose, in view of the uniform meaning which had been given to them in instruments of a nature similar to this certificate, by the courts of Massachusetts. In short, from the certificate itself, read in the light of the circumstances under which it was made, we think it is fair to conclude that Joseph Mullen used the words "heirs-at-law" in their popular sense, as meaning those persons who would take his intestate personal property under the statute of distributions of the State of Massachusetts, and that under them, consequently, he meant to include his widow.

The money due upon the certificate at the time of his death formed no part of his estate, but belonged to the beneficiaries. It nowhere appears that the deceased had the power to substitute other beneficiaries in place of the class first designated; and if he had, it is quite certain that he never exercised it. This certificate, then, was in effect a valid agreement, on the part of the association, to pay the money to become due under its provisions, to the beneficiaries designated therein. When due, the money certainly belonged to them and not to the estate of the deceased. *Conn. Mutual Life Ins. Co. v. Burroughs*, 34 Conn. 305; *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60; *Masonic Aid Asso. v. Jones*, 154 Pa. St. 99.

There is no error apparent upon the record.

In this opinion the other judges concurred.¹

¹ *Acc.* *Codman v. Krell*, 152 Mass. 214, 25 N. E. 90. But see *Price v. Tally*, 10 Ala. 946. — Ed.

KNIGHTS TEMPLARS AND MASONIC MUTUAL AID
ASSOCIATION *v.* GREENE.

CIRCUIT COURT OF THE UNITED STATES, S. D. OHIO. 1897.

[*Reported 79 Federal Reporter, 461.*]

PETITION in the nature of an interpleader filed by the plaintiff association against the widow, mother, and brothers and sisters of John G. Greene, filed in the Superior Court of Cincinnati, and removed to this court. The petition was filed to determine who among the defendants should be paid the amount of an insurance policy issued by the plaintiff association in 1879 on the life of John G. Greene for the sum of \$5,000. He died in 1894. The plaintiff association was an Ohio corporation; one of its agents went to New York, where Greene then was and always remained domiciled, and secured from him an application for the policy; the policy was mailed from Ohio, probably to the company's agent in New York, and was delivered to Greene. At the time of Greene's death the policy was payable "to the heirs of the said John G. Greene."¹

TAFT, Circuit Judge.² It is contended on behalf of the widow of John G. Greene, the insured, that the word "heirs" should be construed according to the laws of Ohio. If so, it is conceded that, as the insured left no children, she would take the entire fund, whether the word "heirs" is to be construed strictly as meaning those who at his death would inherit real estate from the insured, or is to be taken as meaning those to whom personal property of the insured would be distributed if he died intestate. The administrator of Mary Greene, the mother of the insured (she having died since the beginning of this suit), and the brothers and sisters of the insured, contend that the word "heirs" is to be construed under the law of New York, and that, whether it is to be interpreted technically as those inheriting real estate, or only as next of kin, in either case, by the New York law, the widow, Sarah L. Greene, takes nothing. It is contended by the association (which has paid \$1,000 to the widow) and by the widow that, even if the New York law is to control the meaning of "heirs," the court must construe the word in accordance with that law to mean those to whom the proceeds of the policy would have gone had it been part of his estate and he had died intestate, and in that case by the intestate statutes of New York the widow would receive a moiety of the proceeds of the policy.

The application was made and delivered to the agent of the company in New York, and the certificate or policy was delivered by an agent of the company in New York to the insured. All payments were made in New York by the insured to an agent of the company, both those accompanying the original application and all subsequent ones. These

¹ This short statement of facts is substituted for that of the Reporter. — Ed.

² Part of the opinion is omitted. — Ed.

circumstances, under the decision in *Assurance Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, might seem to justify the conclusion that the contract, having been made in New York, should be construed by the New York law, and thus that the word "heirs," within the intention of the parties, should be construed to be "heirs" as interpreted by the New York law, rather than as interpreted by that of Ohio. I do not propose, however, to rest the decision in this case on its likeness to the case of *Assurance Soc. v. Clements*. There are some additional circumstances in this case which may, perhaps, distinguish this case from that. The policy was to be approved and issued in Ohio. The policy was to be payable there. In cases where both parties are interested in the construction of the insurance contracts, these circumstances are sometimes regarded as important.

But I do not think this a case for construing the terms of a contract to reach the common intent of two parties, and it does not seem to me that the same rules apply. What we are construing here is language of the insured designating the beneficiary of his bounty after his death. By the by-laws of the association he was given power to change this designation at any time before his death. The association reserved no right or power to object to any designation or change of designation, provided the beneficiary named was within those classes of persons to whom, by statute, charter, and its own by-laws the association was permitted to pay policies. Now, it must be conceded that, as those classes are limited by the law of Ohio, the terms used to describe them in the law must be construed according to the law of the State. Therefore the association had no power to agree to pay policies to any person not a member of the family of the insured or not an heir of the insured, as "family" and "heir" are defined by the law of Ohio. Within these classes, however, the association was entirely indifferent who the designated beneficiary might be. It is conceded that each of the claimants at the bar is within the requirement of the statute of Ohio. Subject to the limitation of the statute, the construction of the language of the designation becomes solely a matter of determining the intent of the insured. In other words, the language is to be treated as of a testamentary character, and is to receive, as nearly as possible, the same construction as if used in a will under the same circumstances. *Bolton v. Bolton*, 73 Me. 299; *Duvall v. Goodson*, 79 Ky. 224-228; *Mutual Ass'n v. Montgomery*, 70 Mich. 587, 38 N. W. 588; *Silvers v. Association*, 94 Mich. 39, 53 N. W. 935; *Chartrand v. Brace*, 16 Colo. 19, 26 Pac. 152; *Phillips v. Carpenter (Iowa)*, 44 N. W. 898.

This designation was made in New York, by one domiciled in New York, for distribution to his family, most of whom lived in New York. If we were construing this language as a clause in a will, whether the money bequeathed were payable in New York or Ohio, there can be no doubt that the word "heirs" would be construed under the New York law, because that of the domicil of the testator. *Harrison v. Nixon*, 9 Pet. 483; *Anstruther v. Chalmer*, 2 Sim. 1; *Yates v. Thompson*,

3 Clark & F. 544; *Enohin v. Wylie*, 10 H. L. Cas. 1; *Wilson's Trusts* (*Shaw v. Gould*), L. R. 3 H. L. 55; *Parsons v. Lyman*, 20 N. Y. 103; *Freeman's Appeal*, 68 Pa. St. 151. Following this testamentary rule of construction, I have little difficulty in concluding that Greene intended that the language he used should be construed by the law of New York. Indeed, without the aid of authority, I should reach the same decision. Greene lived in New York, and all the possible objects of his bounty lived there. Is it reasonable to suppose that he would use language to describe them, intending it to be interpreted by the law of some other State? I cannot think so. Nor is there anything in the circumstances of his change of the beneficiary to lead to a different result. If the correspondence between the insured and the association at the time the beneficiary was changed is competent, it shows that he wished the proceeds of the policy to go to his estate, for he used the words "heirs, administrators, executors, and assigns." To this the association responded that the law of its creation forbade a designation to his "estate," but that he might designate his "heirs," which he did. This shows that his purpose was to leave it to those to whom it would go, were it part of his estate and he were to die intestate, and he used the word "heirs" as most nearly accomplishing that purpose. Had he been permitted to designate his estate as the payee, certainly the proceeds of the policy would have been distributed under the New York law. May we not presume that, with the same purpose in view, he intended that the designation he was permitted to make should receive a New York construction? The mere fact that he was cautioned that the Ohio law did not permit him to direct payment to his estate does not, it seems to me, show that he intended the words he used to receive an Ohio construction. He knew that the association did business outside of the State of Ohio. He knew that, so large was the number of New York certificate holders, the annual meeting of the association was held in New York. Was it not most natural for him to think that, so long as he designated persons within the limitation permitted by the Ohio law, the particular individuals named by him should be determined by giving to his language the meaning it would have at his home, where the money was ultimately to come and where the beneficiaries lived? We can be certain that Greene regarded the proceeds of this policy as part of his estate which he was leaving to be distributed at his death; and we may be sure that he did not distinguish between language used in the designation and that which he would have used in a will concerning his personal estate.

In *Mayo v. Assurance Soc.*, 71 Miss. 590, 15 South. 791, it was held that the proceeds of a policy of life insurance issued in New York, and payable to the heirs of the insured, who was domiciled in Virginia, were to be distributed under the laws of the latter State. In *Association v. Jones*, 154 Pa. St. 107, 26 Atl. 255, an association of Ohio, organized under exactly the same law as the complainant, issued a policy payable to the legal heirs of the insured, who was domiciled in Pennsylvania.

It was held that the court must determine who the legal heirs of the insured were by the law of his domicil, to wit, Pennsylvania. The court said (page 108, 154 Pa. St., and page 255, 26 Atl.):

"This contract is made with William D. Jones, of Philadelphia, and it fixes his domicil, and promises to pay the fund to his legal heirs. His domicil being thus here, a promise to pay to his legal heirs must be such as are determined by the intestate laws of such domicil."

In *Association v. Jones*, 154 Pa. St. 99, 26 Atl. 253, a policy was payable "to the devisees, or, if no will, to the heirs, of the said William Jones." The association was organized under the laws of Illinois. It was held that there was no disposition of the proceeds of the policy by the will. It was held that the word "heirs" meant those distributees to whom personal property of the insured would go if he died intestate. It was contended that the words should be given effect according to the law of Illinois, and as, by those laws, the husband's personal property would go to the widow in case of his intestacy, she was entitled to the whole fund. The court held that, as the policy was issued to Jones as a citizen of Pennsylvania, the promise to pay to his heirs must be treated as a promise to pay according to the intestate law of his domicil, and that it was a case for the application of the common-law rule "that personal property has no situs, but follows the person of the owner, and is distributed according to the intestate laws of such owner's domicil."

There are other cases in which the same result was reached, though no question seems to have been raised on the point by counsel or considered by the court. *Gauch v. Insurance Co.*, 88 Ill. 251; *Britton v. Supreme Council*, 46 N. J. Eq. 102, 18 Atl. 675. It may be noted, in connection with the two Pennsylvania cases just cited, that the policy in this case expressly insures the life of John G. Greene, of Schenectady, N. Y. I conclude, both on reason and authority, that the word "heirs," as used in the certificate or policy in the case at bar, is to be construed according to New York law.

And what does the word "heirs" mean, according to the New York law, used in a policy of life insurance? It is well settled in many States that where "heirs" is used, in a will or other document having a testamentary effect, to designate persons who are to receive personal property, it shall be held to mean those persons to whom the personalty of the giver would be distributed if he were to die intestate. Of course, as already said, technically it means those who would inherit the giver's real estate in case of his intestacy. But courts recognize that the word is given in common parlance — *ut loquitur vulgus* — a much wider meaning, and includes all those who would succeed, under the intestate laws of the State, to the enjoyment of the property in question. *Association v. Jones*, *supra*; *McGill's Appeal*, 61 Pa. St. 46; *Eby's Appeal*, 84 Pa. St. 241; *Sweet v. Dutton*, 109 Mass. 589; *Welsh v. Crater*, 32 N. J. Eq. 177; *Freeman v. Knight*, 2 Ired. Eq. 72; *Croom v. Herring*, 4 Hawks, 393; *Corbitt v. Corbitt*, 1 Jones, Eq. 114; *Henderson v. Henderson*, 1 Jones (N. C.), 221; *Alexander v. Wallace*, 8 Lea, 569;

Collier v. Collier's Ex'rs, 3 Ohio St. 369; Doody v. Higgins, 2 Kay & J. 729. . . .

With this construction, we must refer to the statute of distribution of New York to determine how the money in this case must go. Paragraph 2, § 75, tit. 3, of chapter 6 of the statutes of New York on wills and decedents' estates (4 Rev. St. [8th ed.], p. 2565) provides as follows:—

"That if the deceased leave no children the widow shall take a moiety of the personal estate."

Paragraph 6 provides:—

"If the deceased shall leave no children and no representatives of them, and no father, and shall leave a widow and a mother, the moiety not distributed to the widow shall be distributed in equal shares to his mother, and brothers and sisters, or the representatives of such brothers and sisters."

The decree of the court must be, therefore, an order distributing the proceeds of the policy, one-half to the widow, Sarah L. Greene, and one-half to be equally divided between the administrator of Mary Greene, the mother, and the brothers and sisters of John L. Greene, including, as one of the equally sharing distributees, the son of his deceased sister. The widow, Sarah L. Greene, will, of course, be charged with the \$1,000 already paid her by the complainant. The costs will be paid out of the fund.

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by LONDON ASSURANCE v. COMPANHIA DE MOAGENS.

SUPREME COURT OF THE UNITED STATES. 1897.

[Reported 167 United States, 149.]

THE respondents herein duly filed their libel in admiralty against the appellant, the London Assurance, in the United States District Court for the Eastern District of Pennsylvania, in a cause of marine insurance, to recover upon a policy of insurance issued by the company upon some 33,000 (being part of a cargo of about 80,000) bushels of wheat, of which the respondents were the owners, the 33,000 bushels being valued in the policy at \$40,887. The policy was dated December 8, 1890, was issued for \$20,000, and covered the wheat when shipped on board the steamer "Liscard," at New York, bound for Lisbon, Portugal. . . . In the body of the certificate and directly under the subject of the insurance (33,000 bushels of wheat), stamped in red ink, are the words:—

"Free of particular average unless the Vessel be sunk, burned, stranded, or in collision."

On the face of the certificate and on the right-hand side thereof, and at a right angle with the body of the certificate, the following language is printed:

"It is hereby Understood and Agreed that in all cases of loss or damage to the interest insured under this Certificate, the same shall be reported to the Corporation in London as soon as known or expected, and be paid in Sterling at the offices of the Corporation, No. 7 Royal Exchange, London, at the rate of four dollars and ninety-five cents (\$4 95-100) Gold to the Pound Sterling. Claims to be adjusted according to the usages of Lloyds, but subject to the conditions of the Policy and Contract of Insurance."

The cargo was received on board in New York harbor; before starting, the "Liscard" was injured by collision with another vessel. As a result of this collision the "Liscard," having proceeded upon her voyage, shipped water in a heavy gale, and the cargo was thereby damaged. This libel was thereupon brought. The District Court gave judgment in favor of the owners of the wheat, and the Circuit Court of Appeals affirmed the judgment. The insurance company then applied to this court and obtained a writ of *certiorari* to review the judgment.¹

PECKHAM, J. We think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be performed in England. The parties to it understood and agreed that in case of loss or damage to the interest insured under the certificate, the same was to be reported to the corporation at London and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the usages of Lloyds, but subject to the conditions of the policy and contract of insurance.

Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story in his work on Conflict of Laws, § 280, says: "But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice. . . . The rule was fully recognized and acted on in a recent case by the Supreme Court of the United States, where the court said, that the general principle, in relation to contracts made in one place to be executed in another, was well settled; that they are to be governed by the law of the place of performance."

The case referred to in the above section is *Andrews v. Pond*, 13 Pet. 65, in which Mr. Chief Justice Taney, in delivering the opinion of the court, said; "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance, — and if the interest

¹ This statement of facts is condensed from that of the Reporter; part of the opinion is omitted. — ED.

allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

In *Bell v. Bruen*, 1 How. 169, a letter of guaranty was written in the United States and addressed to a house in England, and this court held that "It was an engagement to be executed in England, and must be considered and have effect according to the laws of that country," citing *Bank of the United States v. Daniel*, 12 Pet. 54, 55.

In *Scudder v. Union National Bank*, 91 U. S. 406, the broad statement of the foregoing cases was somewhat narrowed, and it was stated that the law prevailing at the place of the performance of a contract regulated matters connected with its performance, and that matters bearing upon the execution, interpretation, and validity of the contract were determined by the law of the place where it was made. Even upon that limitation of the doctrine, we think the interpretation of the contract was intended by the parties to depend upon the principles of English law as they obtained and were recognized in England by the usages prevailing at Lloyds. This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own. See *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 446, 453.

It appears in evidence also that there were in use two well-known forms of particular average clauses by maritime insurance companies, one or the other being usually stamped on the insurance certificates. One clause reads, "free of particular average *unless caused* by stranding, sinking, burning or collision;" the other clause reads, as in this case, "free of particular average unless the vessel be stranded, sunk, burned or in collision." The clause in use in this certificate was termed the English clause. Many agents of English companies offered either clause, and the form in use in this case was regarded as a better clause for the insured than the "caused by" clause. It did not appear, however, that the London Assurance Company used any other than the clause found in the memorandum in this case.

Referring then to the English law upon the question as to the meaning of this language, the English courts many years ago decided it, and that decision has been adhered to ever since. The English courts have held, and do now hold, that the expression, "free of particular average unless the vessel be stranded," meant that if a loss occurred during the adventure, although from a cause not related in any way to the stranding of the ship, the insurers were liable upon the general language of the policy.¹ . . .

¹ The learned judge here examined the following cases: *Burnett v. Kensington*, 7 T. R. 210; *Harman v. Vaux*, 3 Camp. 429; *Barrow v. Bell*, 4 B. & C. 736; *Kingsford v. Marshall*, 8 Bing. 458; *Thames, etc. Ins. Co. v. Pitts*, [1893] 1 Q. B. 476; *The Glenlive*, [1894] P. 48. — Ed.

From this review of the authorities in England, there can be no doubt that if a ship be once in collision during the adventure, after the goods are on board, the insurers are by the law of England liable for a loss covered by the general words in the policy, although such loss is not the result of the original collision, and but for the collision would have been within the exception contained in the memorandum, and free from particular average as therein provided. It is not material now to inquire as to the course of reasoning by which this construction of the language of the memorandum was reached. Having decided, more than a hundred years ago, what the meaning was, that meaning has been continuously attributed to the memorandum by the English courts up to the present time. The fact that the underwriters still continue its use, under such circumstances, shows that they have adopted this construction, and that they intend this meaning. Any additional exception which they have placed in the memorandum since the first decision, and which forms a part of the original exception, must be given the same meaning. Originally, the exception contained only the word "stranding," but subsequently, and at different times, the words "burned, sunk, or in collision" were added to it, and they must all be given the same construction, as an exception, that has been given to the word "stranding," and, if any of them occur, the memorandum is struck out and the general words of the policy come in force. The question of whether the law of this country does or does not accord with the law of England in this matter does not arise in this case, and we express no opinion upon that question.

Our conclusion is, that the underwriters are liable for the loss, under proper rules of adjustment. . . .

*Decree affirmed.*¹

BETHELL v. BETHELL.

SUPREME COURT OF INDIANA. 1876.

[*Reported 54 Indiana, 428.*]

WORDEN, C. J. Action by the appellee, against the appellant. The complaint contained two paragraphs. The first went out on demurrer. A demurrer for want of sufficient facts was filed also to the second, but was overruled, and exception taken. Such further proceedings were had as that final judgment was rendered for the plaintiff.

Error is assigned upon the overruling of the demurrer to the second paragraph of the complaint.

The second paragraph of the complaint alleges, that, on the 13th of May, 1869, by a deed of conveyance between the appellant and his wife and the appellee, all of whom were and had been citizens of War-

¹ See *Greer v. Poole*, 5 Q. B. D. 272; *Shiff v. La. Ins. Co.*, 6 Mart. N. S. 629; 13 Clunet, 213 (R.G. 16 June, '83). — Ed.

rick County, Indiana, for more than thirty years, the appellant granted, bargained, and sold to the appellee certain lands in Missouri, described by sections, etc., in consideration of four thousand eight hundred dollars.

The deed is copied into the paragraph, and contains the words "grant, bargain, sell, and convey," and purports to be upon a consideration of four thousand eight hundred dollars.

The paragraph then avers that, by the law of the State of Missouri at said date, the defendant, by said deed of conveyance, covenanted to and with the plaintiff that he was seised of an indefeasible estate of inheritance in fee simple, and that said defendant, by force of said law, might be sued upon the same in the same manner as if said covenant had been inserted in the deed.

The paragraph here sets out a section of the Missouri statutes, which corresponds with these allegations, and proceeds to allege, further, that at said date the defendant was not seised of an indefeasible estate of inheritance in fee-simple to said real estate, but, on the contrary, that he had not nor has he yet any title whatever to any part of said lands. That defendant was never at any time in possession of said lands, nor were they ever in the possession of the plaintiff; and that while the plaintiff was ignorant of said want of title, he paid a large amount of taxes on said lands, to wit, some eighteen months, after said conveyance.

The deed, as set out, contains no covenants whatever, either express or implied. There is no general warranty, as provided for by our statute. The words "grant, bargain, sell, and convey" do not imply any covenants in a conveyance in fee, though the words, "grant" or "demise" may imply a covenant of title, in a lease for years. This proposition was decided, after an exhaustive examination of the authorities, in the case of *Frost v. Raymond*, 2 Caines, 188. So that if the deed is to be regarded as containing the covenant of seisin, or, indeed, any other covenant, it must be by virtue of the law of Missouri, set out in the pleading.

Hence, the question arises, whether a deed, executed in Indiana, between her citizens, for land in another State, but containing no covenants whatever by the law of Indiana, shall be construed as containing, by implication, such covenants as would, by the law of the State where the land lies, be regarded as contained in the deed.

This is an interesting and a somewhat novel question. We have been furnished with able briefs by counsel for the respective parties, who have cited the general authorities upon the point, but yet no case has been found entirely in point.

There can be no doubt that the law of Missouri, alone, can be looked to in order to determine whether the deed in question was sufficient to pass the title. In the sale and conveyance of real estate, so far as regards the capacity of the parties to convey and hold, respectively, the formalities necessary to a valid transfer, the dominion and enjoy-

ment of the same by the vendee, and the right of succession thereto, and all other incidents to the acquisition of the land, the *lex rei sitæ* governs.

But it does not, therefore, necessarily follow that the *lex rei sitæ* so far governs conveyances made elsewhere as to change their character as mere conveyances and invest them with the character of personal covenants not necessary to the transmission of the property.

We are referred by the counsel for the appellee to the case of *McGoon v. Scales*, 9 Wall. 23, in which Mr. Justice Miller said: "It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated, we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances."

This was said, however, in reference to the question whether the title did actually pass by a certain deed. The question was, whether "the effect and construction" of the conveyance were such as to pass the title.

As we desire to decide nothing but the exact question presented here, and as the distinction between covenants running with the land and those not running with the land may perhaps be supposed to enter into the question, we proceed to consider the character of the covenant alleged to have been broken. The supposed covenant, of which a breach is alleged, is the covenant of seisin. And it is alleged that the land was never in the possession of the defendant or the plaintiff. There are some cases holding that the covenant of seisin runs with the land, where the grantor was in possession and delivered possession to the grantee. But all the cases, so far as we are advised, hold, that where the grantor is not in possession and does not deliver possession to his grantee, the covenant of seisin, if the grantor had no title, is at once broken and does not run with the land. In the case of *Chambers' Adm'r v. Smith's Adm'r*, 23 Mo. 174, it was held, that "If there be a total defect of title, defeasible and indefeasible, and the possession have not gone along with the deed, the covenant is broken as soon as it is entered into, and cannot pass to an assignee upon any subsequent transfer of the supposed right of the original grantee. In such case, the breach is final and complete; the covenant is broken immediately, once for all, and the party recovers all the damages that can ever result from it. If, however, the possession pass, although without right, — if an estate in fact, although not in law, be transferred by the deed, and the grantee have the enjoyment of the property according to the terms of the sale, the covenant runs with the land and passes from party to party, until the paramount title results in some damage to the actual possessor, and then the right of action upon the covenant vests in the party upon whom the loss falls."

The supposed covenant in this case, then, was one that did not run with the land; it was purely personal and broken as soon as entered into; it was not so connected with the land that any subsequent

grantee thereof could take advantage of it. The question is therefore narrowed down to this: can a deed, executed in Indiana, between citizens thereof, containing no covenants whatever according to the law of Indiana, be held by virtue of the law of Missouri, where the land lies, to contain a covenant not running with the land but broken as soon as entered into? We think this question must be answered in the negative. A covenant of seisin not running with the land is purely a personal covenant, broken as soon as made, and has nothing whatever to do with the transmission of the title to the land. As a general rule the *lex loci contractus* determines the construction and effect of contracts. And we think that where a deed is made, as above stated, the question whether it contains such a covenant is to be determined by the law of the place where it is made.

The case does not fall within another rule of law well established, viz., that where a contract is to be performed in a place different from that in which it is made, the law of the place of performance is to govern the contract. Here, the contract was completely executed and was not executory. By the terms of the deed there was nothing further to be done by the grantor, either in Missouri or elsewhere. There were no stipulations that bound him to the performance of any future act. Whatever title did or could pass by the deed passed immediately upon its execution and delivery, and there was nothing further to be done by the grantor.

As the deed was executed in Indiana, and as the parties resided therein, it would seem that they accepted the law of Indiana as the exponent of the rights conferred and obligations imposed thereby, beyond the mere passing of the title. The case of *Thurston v. Rosenfield*, 42 Mo. 474, is closely analogous in principle. *Rosenfield* failed in business in New York, and in that State made an assignment of his effects, including certain real estate in Missouri, in which assignment certain creditors were preferred. The assignment was regularly executed and acknowledged, so as to pass the title to the land in Missouri, but according to the laws of Missouri it was void on account of the preference given to some of the creditors. But it was held, as the parties were residents of New York and New Jersey, and as the assignment was valid by the law of New York where it was executed, and as the policy of the Missouri law was to deny preferences in that State, that the assignment was governed by the law of New York, and it was upheld accordingly. See *Whart. Confl. Laws*, § 276.

The law of Missouri cannot extend beyond her territorial limits so as to make an instrument containing no covenants, executed in another State, between citizens thereof, contain such a covenant as that alleged here to have been broken.

The case of *Carver v. Louthain*, 38 Ind. 530, was an action upon the covenants contained in a deed for the conveyance of land situate in the State of Illinois. The question does not seem to have been made whether the covenants were governed by the law of Illinois, or other-

wise. But the case was decided upon the theory that the law of Indiana was applicable to it.

The case is, of course, less authoritative upon the point than if the question had been made.

We are of opinion that the second paragraph of the complaint failed to state facts sufficient to constitute a cause of action, and that the demurrer thereto should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

SECTION

EFFECT.

WAVERLY NATIONAL BANK *v.* HALL.

SUPREME COURT OF PENNSYLVANIA. 1892.

[*Reported 150 Pennsylvania, 466.*]

HEYDRICK, J.¹ The plaintiff sues upon notes made by C. M. Crandall, one of the defendants, in his own name, and seeks to charge the other defendants as partners of Crandall in a business in which the proceeds of certain other notes, of which these were renewals, were used. The evidence relied upon to establish the alleged partnership is a contract in writing between Crandall of the one part, and the other defendants of the other part, dated February 24, 1885. If this contract does not create a partnership as to creditors it cannot be successfully contended that all the evidence in the cause taken together tends to charge anybody but Crandall; and inasmuch as all the assignments of error are predicated upon the assumption that such partnership was created by that contract, it is evident that if that assumption was unfounded the plaintiffs could not have been injured by the rulings complained of, and hence, though there may have been technical error therein, the judgment ought not to be disturbed. It is, therefore, pertinent to inquire what were the rights and liabilities of the parties under that contract, although the question is not directly raised by any of the assignments of error.

The whole scope of the contract indicates that a loan of money to Crandall by the other parties in consideration of a share of the profits of a business in which he was to embark was intended, and not a contribution to the capital of a partnership of which the parties were to be

¹ Part of the opinion only is given. — Ed.

the members. The parties of the second part covenanted to furnish three thousand dollars to Crandall, and not to a firm; they were to furnish it to him from time to time as he might require it, and its repayment to them was to be secured by a chattel mortgage upon the tools, machinery, furniture, and fixtures of every kind and nature belonging to or connected with the business in which it was to be used. Crandall might repay it at his option before the expiration of the full term for which he had the right to demand it; and, although it was stipulated that the money so to be furnished should be used in the business contemplated, the right of entire control of that business was recognized to be in, and was expressly conceded to Crandall. And it was further stipulated that nothing in the writing contained should be construed to create a partnership between the parties thereto except as to the profits of the business. These provisions are all consistent with the relation of borrower and lender, and some of them are inconsistent with any other relation. It is therefore manifest that that relation was intended to be established; and the next question is whether, in spite of the intention of the parties, the community of interest in the profits constituted them a partnership as to creditors.

If this were a Pennsylvania contract the question would be answered in the negative by the act of April 6, 1870, P. L. 56, and by *Hart v. Kelly*, 83 Pa. 286. But, although it was made in this State, it was to be executed in the State of New York. Such cases are stated by approved text writers to be an exception to the general rule that the *lex loci* applies in respect to the nature, obligation, and construction of contracts. That exception is thus stated by Judge Story: "But where the contract is either expressly or tacitly to be performed in any other place the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." *Conflict of Laws*, § 280. Chancellor Kent, after stating the exception in substantially the same terms, adds that it "is more embarrassed than any other branch of the subject (the *lex loci*) by distinctions and jarring decisions." 2 *Com.* 459. But whatever conflict of authority there may be in respect to the exception, all agree that matters connected with the performance of a contract are regulated by the law prevailing at the place of performance. *Brown v. Railroad Co.*, 83 Pa. 316; *Scudder v. Union National Bank*, 91 U. S. 406. Under the present contract it is clear there could be no liability to third persons without a performance as between the parties to it, and therefore the question of such liability would necessarily be connected with or grow out of such performance and be determinable by the law of New York.

More than a century ago Chief Justice De Grey, in *Grace v. Smith*, 2 Wm. Bl. 998, laid down the proposition that "every man that has a share of the profits of a trade ought also to bear his share of the loss." In a few years the principle thus stated became recognized as a part of the law of England, and so continued until 1860, when it was over-

thrown by the House of Lords in *Cox v. Hickman*, 8 H. L. C. 268. On this side of the Atlantic, and especially in the State of New York, it was accepted without question, so far as I have observed, as to the soundness of the reasons put forth in support of it, until it was exploded in England. . . .

It is said, however, in *Hackett v. Stanley*, 115 N. Y. 625, . . . that "exceptions to the rule (that participation in profits of a business renders the participant liable to creditors) are, however, found in cases where a share in profits is contracted to be paid, as a measure of compensation to employees for services rendered in the business, or for the use of moneys loaned in aid of the enterprise." It is not material to inquire how much more of the rule is left by this exception than was left by *Cox v. Hickman*. It is enough that the present case comes within the letter and the spirit of the exception. The parties who made the loan and who are now sought to be held liable as partners had no voice or part in the prosecution of the business either as principals or otherwise, nor had they an irrevocable right to demand a share of the profits as was the case in *Hackett v. Stanley*. The right of control, or any voice in the control, an incident of proprietorship, was denied to them. And the implication of partnership from community of interest in the profits was excluded by an express stipulation, the absence of which in *Hackett v. Stanley* was thought to be worthy of notice: and their right to demand a share of the profits was to terminate upon repayment of the money advanced at the end of five years, or sooner at the option of Crandall. In all its material provisions the contract under consideration is not distinguishable from that in *Curry v. Fowler*, 87 N. Y. 33, or from those provisions of the contract in *Hackett v. Stanley* which it is there conceded would create no other relation than that of borrower and lender.

For these reasons the defendants as to whom issue was joined are not liable to the plaintiff, and therefore the judgment must be affirmed.

BALDWIN v. GRAY.

SUPREME COURT OF LOUISIANA. 1826.

[*Reported 4 Martin, New Series, 192.*]

PORTER, J.¹ The facts in this case do not appear to be controverted; the only matter disputed is the legal obligations which arise on them.

The plaintiff was agent for the steamboat "Fayette," of which the defendant was part-owner. This action is instituted to recover the amount of an appeal bond, given in an action, wherein the owners of

¹ Part of the opinion only is given. — ED.

this boat were defendants, and also for moneys paid for the expenses of the boat while in this port.

It is insisted the defendant is liable *in solido*, because the contract by which he became interested in this vessel was entered into at Pittsburgh, in the State of Pennsylvania, where the common law prevails.

This law governs the obligation of the partners with each other, but not with third persons. It can no more affect the rights of those who contract with them in a different country, than particular stipulations between the partners could. The contract entered into in the case before us was made in this State, and must be regulated by the *lex loci contractus*. This is the general rule, and we know of no exception to it, unless the agreement is in respect to land in another country, or the performance is to be in another State. A foreigner coming into Louisiana who was twenty-three years old could not escape from a contract with one of our citizens by averring that according to the laws of the country he left he was not a major until he reached the age of twenty-five.

We think, therefore, that the defendant is only liable for his virile portion of the moneys laid out and expended on the steamboat "Fayette." *Caroll v. Waters*, 9 Mart. 500.

KING v. SARRIA.

COURT OF APPEALS, NEW YORK. 1877.

[Reported 69 New York, 24.]

FOLGER, J.¹ The plaintiffs seek to recover a sum of money from the defendant Sarria, upon contract. They do not show that he in person made with them the contract which they allege. It is, indeed, one of the conceded facts in the case, that the contract was made, as matter of fact, by persons other than Sarria. To succeed, then, in their action, they must show that those persons in some way represented Sarria, and had authority to bind him thereto, to the full extent to which the plaintiffs seek to hold him. To show such authority, proof is made that Sarria was a partner with Grau & Lopez, and that the latter two, under the firm name of Grau, Lopez & Co., made the contract. If nothing more appeared in the case, this would suffice for the plaintiffs; for, by virtue of the relation of partnership, one partner becomes the general agent for the other, as to all matters within the scope of the partnership dealings, and has thereby given to him all authority needful for carrying on the partnership, and which is usually exercised by partners in that business. *Hawken v. Bourne*, 8 M. & W. 703. Indeed, it is as agent that the power of one partner to bind his co-partner is obtained

¹ Part of the opinion only is given. — ED.

and exercised. The law of partnership is a branch of the law of principal and agent. *Cox v. Hickman*, 8 H. of L. Cas. 268; *Baring v. Lyman*, 1 Story, 396; *Worrall v. Munn*, 5 N. Y. 229. In the case first above cited (8 M. & W. *supra*), it is added: that any restriction which by agreement amongst the partners is attempted to be imposed upon the authority which one partner possesses as the general agent of the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made. It is manifest, however, that this remark is to be qualified, when taken in connection with any statute law, which has provided for the formation of limited partnerships, where that statute law is operative. A due observance of such statutory provisions limits the liability of the special partner. It limits, too, the authority of the general partner, as the agent of the special partner, and fixes beforehand the extent to which, as agent, he may bind the special partner. It is hardly necessary to say that when a limited partnership is duly formed and carried on under our statute, though the general partner is the agent for all the partners, with powers full enough to transact all the business of the firm, and to bind it to all contracts within the scope of that business, he gets no authority, from his relation as partner and agent of the special member of the firm, to fix upon him any greater liability than that which has been stipulated for. These principles are stated here, not as new or forgotten by any one, but as the basis upon which the determination of this case will rest.

It turned out that the partnership of Grau, Lopez & Co. was created by a formal instrument in writing, and that, by its terms, the liability of Sarria was special, and limited in extent to a fixed amount. That instrument (it is found as fact by the learned referee), and all the doings of the three partners under it have been in due accord with the commercial code of Spain, of which nation they were citizens, and under whose government and laws they were living and acting when they executed the instrument, and formed and carried on the partnership. And it is proven and found as fact in the case, that when, in due pursuance of the Spanish law, a person has, as did Sarria, entered into such a partnership with others, and has, as did Sarria and his partners, duly observed and carried out the provisions of the law and the terms of their agreement, the liability of the special partner, as was Sarria, is limited to the amount of funds which he has contributed according to his agreement. It is well to observe here, that the learned referee has found that Sarria never had any partnership connection with Grau & Lopez, other than that of a limited partner; that he did not use, nor permit to be used, his name in the firm name; that he did not, by any representation, act, or omission, hold himself out, or render himself liable, as a general partner. We have then, Sarria himself making, in person, no contract with the plaintiffs, and giving a special and express authority only, to Grau & Lopez to make

one, which authority was in exact pursuance of law. Those who deal with one as agent do so at their peril, if it turns out that he had no authority from a principal; and where they rely upon his delegated authority as that of a partner, and know that the partnership was created in another country, must they not look to it, to see how far that law, and the partnership under it, gave power to the acting partner? As then, the power of Grau & Lopez to bind Sarria by contract was that of partners, that is, of agents; and as their authority was lawfully restricted, so that they could not bind him in a liability greater than that named in the contract of partnership, it seems to follow that the plaintiffs have no contract which can be enforced against Sarria, otherwise or further, than is provided for by the terms of that authority. Nor did Grau & Lopez make the contract with the plaintiffs in the name of Sarria, nor with any special claim of right to represent him. They made it in the name of Grau, Lopez & Co., and claiming only to represent that partnership. As to Sarria, the unnamed partner, they were agents, acting under an authority special, express, limited, and could give to the plaintiffs no more claim upon Sarria than such an authority empowered them. The plaintiffs were subject, in these dealings with Sarria, to the limitations which he had lawfully put upon the powers of his agents. Again, to state familiar doctrine, no one, in dealing with an agent, may hold the principal to a contract which was not within the authority of the agent to make; nor where there is an express written authority, is it to be enlarged by parol, or added to by implication. It is to be construed, as to its nature and extent, according to the force of the terms used, and the objects to be accomplished.

But it is claimed by the learned counsel for the plaintiff that the Commercial Code of Spain cannot have an extraterritorial effect; and that one dealing in this State, in which that law does not rule, cannot avail himself of its effect. If this be so, it must be because the law of this State forbids a foreigner, in such a case as this, from invoking the aid of any law of his domicile. But one country recognizes and admits the operation within its own jurisdiction of the laws of another, when not contrary to its own public policy, nor to abstract justice, nor pure morals. It does this on the principle of comity. It has been so long practised that it is stated as a principle of private international jurisprudence, that rights which have once well accrued by the law of the appropriate sovereign are treated as valid everywhere. Westlake on Priv. Int. Law, art. 58.

The principle, from which originates the influence exercised by the law of a foreign State, in determining the status or rights of its subjects in another country, is thus well stated. It is the necessary intercourse of the subjects of independent governments, which gives rise to a sort of compact, that their municipal institutions shall receive a degree of reciprocal efficacy and sanction within their respective dominions. It is not the statutes of one community which extend their controlling power into the territories of another; it is the sovereign of

each who adopts the foreign rule, and applies it to those particular cases in which it is found necessary to protect and cherish the mutual intercourse of his subjects, with those of the country whose laws he adopts. Per Sir Samuel Romilly, *arguendo*, *Shedden v. Patrick*, 1 Macqueen's H. of L. Cases, 554.

It cannot be said that there is a rule of exclusion, on account of this particular law being contrary to our public policy. It much resembles our own statute for the formation of limited partnerships, and, with some difference in detail, it aims at the same beneficial result, which ours has in view; nor may we say, with our statute before us, that the law is opposed to good morals or abstract justice. There cannot be that exclusion, because it is a rule of our law not to give in any case to a foreigner the benefit of the law of his domicil.

Mr. Nash was correct, in opening his argument, in saying that this is a case of first impression in this State. Hence it is, that in looking for the reasons upon which it is to be decided, we have to be governed by the analogies of the law, rather than cases in point. Let us see where those analogies tend. If one marry, where marriage is only a civil contract, his marital relation will be held valid, in a country where a religious ceremony is, by its law, deemed vital. The same principle prevails with us, though not called into application by such a state of facts. It is an established principle that the law of the place where contracts purely personal are made, must govern as to their construction and validity, unless they are made to be performed in another State or country. *Curtis v. Leavitt*, 15 N. Y. 227; *Chapman v. Robertson*, 6 Paige, 627. This contract of partnership was made to be performed in Cuba. The contract made by the partnership with the plaintiffs, it may be conceded, was made in New York, to be performed here. The contract with the plaintiffs will be construed and enforced by the laws of this State, and they will determine the nature and extent of the liability upon it, of the partnership, the maker of it. The former, the contract of partnership, between the members of the firm, will be construed and weighed by the laws of Spain, and they will determine the liability of Sarria, and the extent of the authority given by him to Grau & Lopez. In *Comm. of Ky. v. Bassford*, 6 Hill, 526, the Supreme Court of this State maintained an action on a bond, given to secure the payment of money, to be raised and distributed by a lottery, on the ground that it was a valid and legal obligation in Kentucky, where it was assumed that it was made, and where it was to be executed, though opposed to the statutory policy of this State. And the rule has been so far carried, in one jurisdiction, in recognizing the law of the domicil, as to enforce a claim of property in slaves. *Madrazo v. Willes*, 3 Barn. & Ald. 353; see also, *Greenwood v. Curtis*, 6 Mass. 358; *Com. v. Aves*, 18 Pick. 215; *The Antelope*, 10 Wheat. 66; and so far in another jurisdiction as to hold good a sale of lottery tickets in this State. *McIntyre v. Parks*, 3 Metc. 207.

There is a close analogy between this case and questions arising as

to the authority of the master of a vessel to bind his owners in a foreign port. Though the solution of the latter depends upon the rules of the maritime law more particularly, yet the relation of the master and the owners is but a branch of the general law of principal and agent, and so the ultimate reason of each starts from the same root. It is not a new doctrine, that a master of a vessel cannot bind her owners in a foreign port, to any greater liability than will be recognized by the law of their domicil. *Pope v. Nickerson*, 3 Story, 465. And the rule there laid down has been recognized and applied in the Court of Queen's Bench, on the principle that the power of the master to bind the owners personally is but a branch of the general law of agency. *Lloyd v. Guibert*, 6 Best & Smith, 100; s. c. in Exch. Ch., id. That case, also, in its reasoning, recognizes the distinction which we have stated, between the law which is to affect the question of the authority to make a contract, and that which is to determine the validity and effect of the contract when made. It was urged there, too, by counsel, but without effect, that the law of the place where the contract was made, and of the place where it was to be performed, was different from the law of the domicil of the defendants. It was also urged that the contract entered into was *bona fide*, in the ordinary course of business by the master, and within the scope of his ostensible authority to contract; and that his power could not be narrowed by provisions of foreign law, unknown to the party dealing with him, more than by secret instructions, but urged without avail. So, also, in the case of *The Moxham*, 1 P. Div. 107, it is pertinently said: "One can understand that a contract between master and servant, or the relations between principal and agent, may affect a contract made by the agent, *qua* agent, with foreigners; that is to say, it may affect the nature and extent of his agency."

So, too, in actions of tort, it has been held that an extraterritorial law will furnish a defence in the courts of England. *Phillips v. Eyre*, Law Rep. 6 Q. B. 1. It is said that an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct, exceptional legislation. See also *Dobree v. Napier*, 2 Bing. N. C. 781.

The effect of the judgments in these cases is this: That where the essentials of a contract made under foreign law are not hostile to the law and policy of this State, the contract may be relied upon and availed of in the courts of this State. If the substance of the contract is against that law and policy, our judicatories will refuse to entertain it and give it effect. Hence, the contract of partnership made by Sarria, in Cuba, may be availed of by him here.¹

¹ *Acc. Barrows v. Downs*, 9 R. I. 446; *Hastings v. Hopkinson*, 28 Vt. 108. — Ed.

CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH COMPANY.

COURT OF APPEAL. 1890.

[Reported [1891] 1 *Queen's Bench*, 79.]

APPEAL from a judgment of DAY, J., on a preliminary issue.

In the year 1880 the plaintiff, who was a Brazilian subject and resident in Brazil, executed, in favor of one Broe, a stock-broker carrying on business in the city of London, a power of attorney to purchase and sell shares in public companies and public funds. The power of attorney was in the Portuguese language, and was executed by the plaintiff in Brazil with the formalities required by the Brazilian law. Broe, purporting to act under the power of attorney, disposed of certain shares in the defendant company which were the property of the plaintiff and registered in his name. Broe did not account to the plaintiff for the proceeds of the sale of these shares, the purchasers of which were registered as owners in the books of the company. The plaintiff issued an originating summons asking for the rectification of the register by inserting therein his name as holder of the shares, and an issue was directed to be tried by a jury in London to determine whether the plaintiff was entitled to have the register so rectified. Before this issue came on for trial an order was made that the question whether Brazilian or English law was to govern the construction of the power of attorney should be tried by a judge without a jury. The matter came on before DAY, J., who decided that English law was to govern the construction of the power of attorney, and a certificate to that effect was accordingly made out.

The defendants appealed.¹

LORD ESHER, M. R. In this case a person resident in Brazil and carrying on business there wrote down that which he intended to be an authority to an agent, if that agent would accept the delegation. The person whom he desired to be his delegate did afterwards accept that delegation. The question raised is, what is the meaning of that document? Now, I agree that it has one meaning, and no more; and the question is, what was the meaning of the plaintiff when he wrote that document? The court has to ascertain that meaning from a consideration of what it is that was written under the circumstances in which it was written; that is, in other words, having regard to the words used, and to the surrounding circumstances at the time they were used.

Now, this writing was a business document, written in Brazil in the Brazilian language, and with the formalities necessary according to the Brazilian law and custom, by a man of business carrying on business

¹ Arguments of counsel and concurring opinion of LINDLEY, L. J., are omitted.
— ED.

in Brazil. An English court has to construe it, and the first thing, therefore, that the English court has to do is to get a translation of the language used in the document. Making a translation is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the language used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstances. Therefore you would want a competent translator, competent to translate in that way, and, if the words in Brazil had in business a particular meaning different from their ordinary meaning, you would want an expert to say what is that meaning. Amongst those experts you might want a Brazilian lawyer; and a Brazilian lawyer for that purpose would be an expert. That is the first thing the court has to do. Then, when the court has got a correct translation into English, it has to do what it always has to do in the case of any such document, — either a contract, or such an authority as this, — that is to say, determine what is to be taken to be the meaning of the party at the time he wrote it, and what is to be inferred from the language which he has used. There are certain inferences which are adopted in ascertaining the meaning of the language used, unless in the particular instance the contrary intention appears. One inference which has been always adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.

Now, applying those rules to the present case, the first thing to be

done is to get at the true construction of the language used in the authority. When the plaintiff used the Brazilian language in this document, he must have used it in the business sense given to it in Brazil. Therefore, that has to be ascertained; and then having got that, the equivalent in the English language must be found. Having got in English the equivalent of the Brazilian words, we have to see what the meaning of the language so used is. If it appears that the contract is to be performed in Brazil wholly, — that is to say, that the contract shall be performed according to Brazilian law, — that is the construction of it, and that is the meaning of the parties; but if it appears that it was to be wholly carried out in England, we should infer that the meaning of the parties and the true construction of the contract were that it was to be carried out according to English law. If we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that in any country where in fact it was to be carried out, that part of it which was to be carried out in that country was to be carried out according to the law of that country. That would be putting one construction only on the document, and not putting a different construction on it in different countries. The one meaning that he had was, "I give an authority which if carried out in England is to be carried out according to the law of England; if in France, according to the law of France." That is one meaning, though this authority is to be applied in a different way in different places.

If that is so, then the way to express that in the present case is this. This authority was given in Brazil, and the meaning is to be established by ascertaining what the plaintiff meant when he wrote it in Brazil. The authority being given in Brazil, and being written in the Portuguese language, the intention of the writer is to be ascertained by evidence of competent translators and experts, including if necessary Brazilian lawyers, as to the meaning of the language used; and if according to such evidence the intention appears to be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon.

Now, that I consider to be a mere expansion of the judgment of DAY, J. It is the same judgment, but it is in an expanded form. His judgment, therefore, is not altered, but is held to be a correct judgment, although we express it in an expanded form. It follows that the appeal fails, and must be dismissed.¹

¹ LINDLEY and LOPES, L. JJ., concurred. See *Pattison v. Mills*, 1 Dow & Cl. 342; *Maspens v. Mildred*, 9 Q. B. D. 530; *Oliver v. Lake*, 3 La. Ann. 78; *Kerslake v. Clark*, More's Notes, 6.

As to the effect of a statute making a husband liable for the debts of his wife, a trader, upon the liability of a husband domiciled abroad, see *Hill v. Wright*, 129 Mass. 296. — ED.

HAMLYN AND CO. v. TALISKER DISTILLERY.

HOUSE OF LORDS (SCOTCH APPEAL). 1894.

[Reported [1894] Appeal Cases, 202.]

LORD HERSCHELL, L. C. My Lords, on the 27th of January, 1892, an agreement was entered into between Roderick Kemp & Co. of the Talisker Distillery, Carbost, Isle of Skye, and Hamlyn & Co. of London, under which Hamlyn & Co. were to supply to the distillery a patent drying machine which was to be worked by the distillery company, who were to bag up and deliver to Hamlyn & Co. dried grain free on board at Carbost to their order or otherwise as required. The agreement concludes with a clause in the following terms: "Should any dispute arise out of this contract the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." This agreement was made between the parties in England.

Shortly after the contract was entered into Alexander Grigor Allan became the sole partner in the firm of Roderick Kemp & Co., and the present action was instituted by him in Scotland in respect of an alleged breach of the contract. The defenders pleaded that the Court of Session had "no jurisdiction," and that "the action is excluded by the clause of reference in the memorandum of agreement." These pleas were repelled by the Lord Ordinary, and his judgment was affirmed by Lord ADAM and Lord M'LAREN, in the Inner House, Lord KINNEAR dissenting. During the course of the litigation the pursuer died, and is now represented by the respondents.

It is not in controversy that the arbitration clause is, according to the law of England, a valid and binding contract between the parties, nor that according to the law of Scotland it is wholly invalid inasmuch as the arbiters are not named. The view taken by the majority of the court below is thus expressed by Lord ADAM: "So far as I see, nothing required to be done in England in implement of the contract. That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the *lex loci solutionis*, that is, by the law of Scotland."

It is not denied that the conclusion thus arrived at renders the arbitration clause wholly inoperative, and thus defeats the expressed intention of the parties, but this is treated as inevitably following from the rule of law that the rights of the parties must be wholly determined by the *lex loci solutionis*. I am not able altogether to agree with the view taken by the learned Lord that everything required to be done in implement of the contract was to be done in Scotland, inasmuch as it appears to me that the arbitration clause which I have read to your Lordships does not indicate that that part of the contract between the

parties was to be implemented by performance in Scotland. That clause is as much a part of the contract as any other clause of the contract, and certainly there is nothing on the face of it to indicate, but quite the contrary, that it was in the contemplation of the parties that it should be implemented in Scotland.

The learned judges in the court below treat the *lex loci solutionis* of the main portion of the contract as conclusively determining that all the rights of the parties under the contract must be governed by the law of that place. I am unable to agree with them in this conclusion. Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it.

Now in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way," it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of the contract between them, shall be interpreted according to and governed by the law, not of Scotland, but of England, and I am aware of nothing which stands in the way of the intention of the parties, thus indicated by the contract they entered into, being carried into effect. As I have already pointed out, the contract with reference to

arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and, for the reasons which I have given, I see no difficulty whatever in construing the language used as an indication that the contract, or that term of it, was to be governed and regulated by the law of England.

But then it is said that the Scotch court is asked to enforce a law which is against the public policy of the law of Scotland, and that although the parties may have so contracted the courts in Scotland cannot be bound to enforce a contract which is against the policy of their law. I should be prepared to admit that an agreement which was opposed to a fundamental principle of the law of Scotland founded on considerations of public policy could not be relied upon and insisted upon in the courts of Scotland; and if according to the law of Scotland the courts never allowed their jurisdiction to try the merits of a case to be interfered with by an arbitration clause, there would be considerable force in the contention which was urged by the respondents. But that is not the case. The courts in Scotland recognize the right of the parties to a contract to determine that any disputes under it shall be settled, not in the ordinary course of litigation, but by an arbitration tribunal selected by the parties. If in the present case the arbitrators had been named, the courts in Scotland would have recognized and given effect to and enforced the arbitration clause, and would by reason of it have declined to enter upon a trial of the merits of the case. That being so, I have been unable to understand upon what fundamental principle of public policy the rule can be said to rest that where an arbitrator is not named an agreement between the parties to refer a matter to arbitration ought not to be enforced.

It is not necessary to inquire into the history of the distinction which has arisen in the courts of Scotland between arbitration clauses where arbiters are named and clauses with an unnamed arbiter. It is sufficient to say that when once it is admitted, as it must be, that the courts of Scotland do enforce and give effect to an arbitration clause, and hold their hands from the determination of the merits by reason of the parties having agreed upon it, it seems to me to follow that if this arbitration clause is to be interpreted according to the law of England, and is therefore a valid arbitration clause, there is no reason why the courts in Scotland should not give effect to it just as much as if it were a valid arbitration clause according to the law of Scotland.

But then it is argued that an agreement to refer disputes to arbitration deals with the remedy and not with the rights of the parties, and that consequently the forum being Scotch the parties cannot by reason of the agreement into which they have entered interfere with the ordinary course of proceedings in the courts of Scotland. Stated generally, I should not dispute that proposition so far as it lays down that the parties cannot, in a case where the merits fall to be determined in the

Scotch courts, insist, by virtue of an agreement, that those courts shall depart from their ordinary course of procedure. But that is not really the question which has to be determined in the present case. The question which has to be determined is whether it is a case in which the courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scotch courts would have to be followed; but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the courts in Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail. For these reasons I move that the judgment appealed from be reversed.

The question then arises what course should be taken in the present case, whether the action should be stayed until the arbitration is completed or whether the House should make an order remitting the cause to be determined pursuant to the arbitration clause. My Lords, I am quite satisfied, upon that part of the case, with the suggestion which will be made by my noble and learned friend who will follow me (Lord WATSON), and I think that there is really no difficulty in the manner in which he proposes to give effect to the contract between the parties.

LORD WATSON. This action was brought in the Court of Session by a Scotch distiller, who died during its dependence, and is now represented by the respondents, against the appellant firm, who are merchants in London, concluding for damages in respect of their breach of a mercantile contract. For the purposes of this appeal, it is sufficient to say that the contract which was made in England, but fell to be mutually performed in Scotland, contains this provision: "Should any dispute arise out of this contract, the same to be settled by two members of the London Corn Exchange, or their umpire, in the usual way."

In defence, the appellants pleaded, "(1) No jurisdiction; (2) The action is excluded by the clause of reference." Both pleas were exclusively founded upon the agreement to refer. They were repelled by the Lord Ordinary (KYLACHY), and, in the First Division, by Lords ADAM and M'LAREN, Lord KINNAR dissenting. The learned judges of the majority were of opinion, with the Lord Ordinary, that, inasmuch as Scotland was admittedly the *locus solutionis*, the whole stipulations of the contract, including the clause of reference, must be governed by Scotch law. In that view, the agreement to refer, being to arbiters unnamed, was plainly invalid; and their Lordships accordingly sent the case to proof before the Lord Ordinary.

With reference to the two pleas which have been repelled, I wish to observe that, although they seem to have become stereotyped in cases

like the present, they do not correctly represent the rights of a defender who relies upon a valid contract to submit the matter in dispute to arbitration. The jurisdiction of the court is not wholly ousted by such a contract. It deprives the court of jurisdiction to inquire into and decide the merits of the case, whilst it leaves the court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration, from any cause, prove abortive, the full jurisdiction of the court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine*, the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration. The latter course was adopted in *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company*, 10 Court Sess. Cas. 3d Series (Macpherson), 892, where the reference was to arbiters unnamed, but had been confirmed by statute. I cite that case, not as establishing, but as illustrating the rule of procedure, which was in force long before its date.

The first question in this appeal is, whether the law of England or the law of Scotland applies to the interpretation of the clause of reference. If the law of Scotland must prevail, the judgments appealed from are unimpeachable. If, on the other hand, the contract must be governed by English law, the clause of reference is obligatory according to that law; and, in that event, the further question arises whether the courts of Scotland ought to give the same effect to it as if it had been a binding Scotch covenant.

Upon the first of these questions, I have been unable to arrive at the same conclusion with the courts below. When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties; and amongst these considerations, the *locus contractus* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum, and the place of performance in another. In the present case it does not appear to me to be necessary to discuss the relative value of these considerations, because, in my opinion, the clause of reference is expressed in terms which clearly indicate that the parties had in contemplation and agreed that it should be interpreted according to the rules of English law. If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be con-

strued according to these principles. And, to my mind, their selection from the membership of a commercial body in London of a conventional tribunal which is to act "in the usual way," or, in other words, in the manner which is customary in London, indicates, not less conclusively, that, in agreeing to such an arbitration they were contracting with reference to the law of England.

Upon the assumption that the contract must be read in the light of English law, the respondents maintained that, in so far as concerns the agreement to refer, that law is inadmissible. They argued that the agreement relates, not to the substance of the contract, but to the remedy which the parties were to pursue; and that, according to a well-known principle of general law, all questions touching the remedy must be decided according to the rules of the forum in which the remedy is sought. They also contended that the Court of Session were not bound to recognize any reference to unnamed arbiters, whatever might be its validity elsewhere, to the effect of excluding their own jurisdiction, because its recognition would be contrary to the policy of Scotch law. Neither of these contentions is, in my opinion, well founded.

It has never, so far as I am aware, been seriously disputed, that, whatever may be the domicile of a contract, any court which has jurisdiction to entertain an action upon it must, in the exercise of that jurisdiction, be guided by what are termed the curial rules of the *lex fori*, such as those which relate to procedure or to proof. *Don v. Lippmann*, 2 Sh. & McL. 682, which is the leading Scotch authority upon the point, has settled that these rules include local laws relating to prescription or limitation. But all the rules noticed by Lord Brougham in his elaborate judgment as belonging to that class refer to the action of the court in investigating the merits of a suit in which its jurisdiction has been already established. I can find no authority, and none was cited to us, to the effect that, in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the court ought to disregard an agreement to refer which is *pars contractus*, and binding according to the law of the contract, because it would not be valid if tested by the *lex fori*. Without clear authority, I am not prepared to affirm a rule which does not appear to me to be recommended by any considerations of principle or expediency. One result of its adoption would be that, if two persons domiciled in England made a contract there containing the same clause of reference which occurs in this case, either of them could avoid the reference by bringing an action before a Scotch court, if the other happened to be temporarily resident in Scotland, or to have personal estate in that country capable of being arrested.

The second reason advanced by the respondents for denying effect to the reference would have been more plausible if it had been the law of Scotland that no private agreement could exclude, to any extent, the jurisdiction of the ordinary tribunals. I am not disposed to hold that Scotch courts are bound to give effect to every stipulation in a

foreign contract, unless it is shown to be *contra bonos mores*, in the sense of the law which they administer. There may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply rooted and important considerations of local policy, that her courts would be justified in declining to recognize them. But the law of Scotland has, from the earliest times, permitted private parties to exclude the merits of any dispute between them from the consideration of the court by simply naming their arbiter. The rule that a reference to arbiters not named cannot be enforced does not appear to me to rest upon any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, the rule has been so largely trenched upon by the legislation of the last fifty years, both in general and in local and personal acts, and I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance.

For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and the cause remitted, with directions to sist procedure *in hoc statu*, in order that the matters in dispute may be settled by arbitration in terms of the contract. Such an order will leave the parties at liberty, in the course of the reference, to avail themselves of the provisions of the Arbitration Act, 1889, and will enable the Court of Session, in the event of any lapse of the reference, to dispose of the merits of the case.¹

SECTION VI.

1. ASSIGNMENT.

LEE v. ABDY.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1886.

[Reported 17 *Queen's Bench Division*, 309.]

ACTION against the trustees of the Reliance Mutual Life Insurance Society on a policy of insurance upon the life of Ellis Laurence Lee, deceased, by an assignee of the policy.

The defence (*inter alia*) stated as follows: At the date of the alleged assignment of the policy the said Ellis Laurence Lee was, and he remained till his death, a merchant domiciled in Cape Colony, and

¹ Lord ASHBOURNE delivered a concurring opinion; Lords MACNAGHTEN and MORRIS also concurred.

See 19 *Clunet*, 879 (Paris, 2 March, '92). — ED.

the plaintiff was his wife. The title to the policy money is governed by the law of the said colony, according to which the alleged assignment, if executed, was and is void both by reason of the alleged assignee being the wife of the said Ellis Laurence Lee, and by reason that the said Ellis Laurence Lee was, and remained till his death, insolvent, and that his creditors are entitled to the policy moneys.

The plaintiff in her reply objected that the above statements of the defence showed no defence in law. It was ordered by WILLS, J., that the question of law whether, assuming the facts stated in the defence to be true, the rights of the plaintiff under the assignment of the policy were governed by the law of Cape Colony or by that of England, should be disposed of before the trial, and that the policy should be produced on the argument. It appeared in the course of the argument to be an admitted fact that the assignment was executed in Cape Colony, though it was not expressly so stated on the pleadings.

It appeared from the policy that it was effected by the deceased, Ellis Laurence Lee, who was described therein as resident at Kimberley, in South Africa, with the society, which was a life insurance company in London. It recited that the proposal for assurance, and the usual declaration by the assured, had been delivered at the office of the society by him, and that the truth of the statements therein were to form the basis of the contract. The policy money, together with such further sum, if any, as might be apportioned by way of bonus to the policy, was to be paid within three calendar months after proof satisfactory to the directors had been given of the death of the assured having happened within the term of the insurance. The policy contained the usual clause to the effect that the funds of the society should alone be answerable for any demand under the policy.

DAY, J.¹ If it were necessary to determine where the assured was domiciled when the policy was entered into, or where the policy must be considered as having been made, or where it is payable, there might be some difficulty in doing so upon the facts so far as they at present appear before us; but in the view I take it is unnecessary to go into those questions. It seems to me that quite independently of those considerations the assignment of the policy was invalid. The subject-matter of the assignment is a chose in action which has no locality. The general rule, subject to exceptions which do not seem to me to apply to the present case, is that the validity and incidents of a contract must be determined by the law of the place where it is entered into. The assignment here in question is an assignment that exists if at all by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment. Now the contract in fact entered into by the parties to the assignment was entered into in Cape Colony, and the parties were domiciled there, and, as I have said, it had relation to a

¹ Arguments of counsel and the concurring opinion of WILLS, J., are omitted. — ED.

chose in action which has no locality. It is argued that the validity of this contract must be determined by the law of England. Why should that be so? The reason given is that the parties are contracting with reference to a contract which is affected by the law of England. That consideration seems to me to be immaterial. They are domiciled and are contracting in Cape Colony, and by the law of that colony, as it seems to me, the validity or invalidity of such contract must be determined. It was urged upon us that this conclusion would occasion great inconvenience to insurance companies. But I cannot see that much greater difficulty would arise in ascertaining whether an assignment was good according to foreign law than in the ordinary case of an assignment under English law. No doubt people are theoretically bound to know the law of their country, but in point of fact in many cases they do not, and there might often be difficulties in ascertaining whether an alleged assignment according to English law had been validly effected. I do not think that any additional difficulty occasioned by the assignment being governed by foreign law is of so much moment as was suggested. We were pressed with the authority of the case of *Lebel v. Tucker*, Law Rep. 3 Q. B. 77, but the decision there had relation to a bill of exchange, and I do not think that case is analogous to the present. It seems to me that the question which really arises here is one of the validity of a contract which is purely foreign, though such contract has relation to a chose in action which possibly arises upon an English contract. For these reasons I think our judgment must be for the defendants.¹

WILLIAMS v. COLONIAL BANK.

COURT OF APPEAL. 1888.

[*Reported 38 Chancery Division, 388.*]

COTTON, L. J.² These are two appeals, one in each action. Each action was brought by the executors of the late Mr. Williams, one against the Colonial Bank, and the other against the Chartered Bank of Australia. Each action was to prevent the defendant bank from dealing with and claiming as its own certain shares in an American railway company, the New York Central and Hudson River Railroad Company.

Mr. Williams at the time of his death was the owner of 1210 shares in that company, which were standing in his name, and his executors

¹ *Acc. Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651. But see *Brown's Appeal*, 125 Pa. 303, 17 Atl. 419. — Ed.

² Parts of the opinions given and the concurring opinion of BOWEN, L. J., are omitted. — Ed.

shortly after his death desired that those shares should be transferred from the name of the testator into their own names in the books of the company. Those shares, in parcels of ten, were represented by certificates, and the executors sent those certificates to Messrs. Thomas, who were brokers in London, for the purpose of their getting the shares transferred into the names of the executors. At first they did not sign the power of attorney on the back of the certificates, the certificates were sent back to them, and the two executors who had then proved signed the power of attorney on the back of the certificates, leaving it in blank, not naming any attorney nor filling in the name of any one as the person to whom the shares were to be transferred. The shares were not transferred into the names of the executors, and a member of the firm of brokers used the certificates for his own purposes. At first he deposited the whole of them with the Colonial Bank, as a security for money due to them from his firm. In the year 1883, two years and a half after the certificates had been signed and left with the brokers, the brokers got some of these certificates back from the Colonial Bank, and the same member of the firm deposited them for an advance with the Chartered Bank of Australia. In 1884 the firm became bankrupt, and inquiries were made by the executors as to what had become of their certificates which they had left with the firm up to that time, and apparently without inquiry, except an inquiry made in December, 1882, when the fraudulent member of the firm told them that the certificates were quite safe in America. They found that these certificates were not in the possession of the brokers, but of the banks, and the banks claimed to be entitled to them according to American law. The plaintiffs brought their actions to assert their title to the shares. At the time when the actions were commenced the shares were still standing in the name of the testator, and the certificates were in the same state as when handed to Thomas & Co. Mr. Justice Kekewich decided in favor of the defendants, and dismissed both actions. The question before us is, was he right in so deciding?

I will first say a few words as to the nature of these certificates. On the face of them each is a certificate that Mr. Williams was entitled to ten shares of \$100 each in the capital stock of the railroad company, transferable in person or by attorney in the books of the company only on the surrender and cancellation of this certificate by an indorsement thereof hereon in the form and manner prescribed by the regulations of the company. Then on the back there was this: [His Lordship read the indorsement.] The two executors who had proved signed these indorsements, leaving the names of the transferee and of the attorney in blank. The banks contend that, according to American law, and by the delivery of these certificates with signed transfers upon them, they became entitled both at law and in equity to the shares which are represented in the certificates as belonging to the testator; and that as the means were given to them of requiring a transfer by

the company of the shares into the name of the transferee, though as against the company they cannot be considered as having the rights of shareholders till their names are entered in the books of the company, yet as between transferor and transferee they have both the legal and equitable title. According to English law of course they would have no legal title. They would have a mere inchoate title, which, according to English law would not enable the transferees to hold the shares as against the executors who are the legal owners, but it appears that according to American law the transferee has not only an equitable title but a legal title to the shares. . . .

Now the question here whether Thomas & Co. gave the banks a good title to the certificates depends on transactions in England, and must be decided by the law of England, and not by the law of America. The law of America, in my opinion, is properly referred to for the purpose of deciding what would be the effect of a valid effectual transfer of the certificates on the title to shares in an American company, but whether Thomas & Co. transferred to the banks a good title to the certificates depends on transactions in England, and in no way depends on the law of America. So also the question whether the plaintiffs have been estopped by any act of theirs from questioning the title of the transferees of Thomas & Co. must be a question of English law. . . .

LINDLEY, L. J. I am of the same opinion, and were it not that all cases of this kind are of the greatest importance, I do not know that I should consider it necessary to say anything, but when we have to decide which of two innocent people is to suffer from the fraud of a third it is necessary to be very careful and to take great pains to assure ourselves that the party against whom we decide is, according to law, in the wrong.

First of all, let me dispose of the questions as to American law. As I understand the evidence given by the American lawyers, if this transaction had taken place in America the banks would have got a good title to these shares, subject possibly to the question about the documents not being properly attested. I doubt very much whether the American lawyers would have attached much importance to that, and I shall assume throughout my judgment that if this transaction had taken place in America the banks would have succeeded. Now, the American law is important up to a certain point, but not beyond that point. We must look to the American law for the purpose of understanding the constitution of the railway company and the proper mode of becoming a shareholder in it. Moreover, it may be that the consequences of having acquired a title to the certificate may depend on American law, but the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all. One question, and to my mind the main question, resolves itself into this, — Who is entitled to these certificates? Now the certificates have been dealt with by the executors in England, and the

certificates are chattels, and when we are considering who is entitled to a chattel bought or sold or pledged in England, it is English law and not American law that is to govern the case.¹ . . .

JACKSON v. TIERNAN.

SUPREME COURT OF LOUISIANA.

[Reported 15 Louisiana, 485.]

MARTIN, J.² This is an action to recover the sum of two thousand four hundred dollars, with six per cent interest per annum, according to the laws of Maryland, on an assignment, for a valuable consideration, by one Thomas H. Fletcher, to the plaintiff of this sum, to be paid by the defendants, from so much of the proceeds of a shipment of tobacco made to them by Fletcher, who was indebted to the plaintiff. The latter took this assignment without any other security, against a protested bill of exchange, for the same amount, on being shown the receipts of the agent of the defendants, that Fletcher owed them nothing, and that the consignment of tobacco had actually been made. The assignment was made on the 21st of May, 1819, at Nashville, and the defendants resided in Baltimore. . . .

The counsel for the plaintiff has shown that although the assignment of a debt would be disregarded by, or rather would not be enforced in the common law courts of the State of Maryland, which is the *locus solutionis*, yet the assignment even of a part of a debt would be enforced in the Courts of Chancery in that State: provided the debtor assented thereto; or an obligation, resulting from the assignment of a part of the debt may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract. As, for example, the deposit of money in a bank; the proceeds of a crop sent by a planter to his commission merchant for sale; or those of a shipment of produce to a consignee or factor in Baltimore, Liverpool, or Havre, which is the present case. See the case of *Poydras v. Delamare et al.*, 13 La. Rep. 98; *Mandeville v. Welch*, 5 Wheat. 277. See also 2 Story's Eq. Jur. § 1044; 3 Swanst. Rep. 393; *Tiernan v. Jackson*, 5 Pet. 598.

The plaintiff had, therefore, an equitable right, on this assignment, in the State of Maryland. The courts of this State are bound to enforce equitable rights. These rights are to be tested by the *lex loci contractus*, though the remedy here must be sought according to our laws, to wit, the *lex fori*.

¹ See *Masury v. Arkansas Nat. Bank*, 87 Fed. 381, *ante*, p. 181. — ED.

² Part of the opinion only is given. — ED.

SECTION VII.

PERFORMANCE.

JACOBS v. CRÉDIT LYONNAIS.

COURT OF APPEAL. 1884.

[Reported 12 Queen's Bench Division, 589.]

BOWEN, L. J. The plaintiffs in this case are esparto merchants carrying on business in the city of London, and the defendants are a banking firm also carrying on business in the city.

By a contract made in London on the 6th of October, 1880, the defendants agreed to sell to the plaintiffs 20,000 tons of Algerian esparto, to be shipped from Algeria during the year 1881 by monthly deliveries on board ships or steamers to be provided by the plaintiffs, payment to be made by cash on arrival of the ship or steamer at her port of destination. The defendants delivered a portion of the esparto under the contract, but failed to deliver the remainder; and this action was brought by the plaintiffs for its non-delivery. The defendants in their statement of defence admitted the non-delivery complained of, but alleged that the insurrection in Algeria and the military operations connected with it had rendered the performance of the contract impossible; and that by the French Civil Code, which prevails throughout Algeria, *force majeure* is an excuse for non-performance. The plaintiffs demurred to this defence on the ground that the contracts were governed by English law and not by the law of Algeria, and further alleged that the defendants or their agents could have procured and shipped esparto from other parts of Algeria where *force majeure* did not exist. The defendants to the latter allegation rejoined that the insurrection and military operations rendered it impossible to transport such esparto as last mentioned to the place fixed in the contract for approval by the plaintiffs of its quality before shipment, or to transport the same to the place fixed in the contract for shipment. To this rejoinder there was a further demurrer upon similar grounds. The Queen's Bench Division having given judgment upon both demurrers for the plaintiffs, the case now came before us upon appeal.

The question which we have in substance to consider is, whether non-performance of their agreement by the defendants can be excused on the ground that military operations in Algeria and the Algerian insurrection had rendered its performance impossible, and that such an excuse would have been recognized by the French Civil Code which prevails in Algeria, in conformity with the following section as translated from

the French: "There is no ground for any damages when by means of a superior force or an accident the obligor has been prevented from giving or doing that which he was bound to give or do, or has done that which he was not bound to do." The first matter we have to determine is, whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts. What is to be the law by which a contract, or any part of it, is to be governed or applied, must be always a matter of construction of the contract itself as read by the light of the subject-matter and of the surrounding circumstances. Certain presumptions or rules in this respect have been laid down by juridical writers of different countries and accepted by the courts, based upon common sense, upon business convenience, and upon the comity of nations; but these are only presumptions or *primâ facie* rules that are capable of being displaced, wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties. "The general rule," says Lord Mansfield, "established *ex comitate et jure gentium* is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom." *Robinson v. Bland*, 1 W. Bl. 258 (see *Peninsular and Oriental Steam Navigation Co. v. Shand*, 3 Moo. P. C. (N. S.) 291). This principle was explained by the Exchequer Chamber in the case of *Lloyd v. Guibert*, Law Rep. 1 Q. B. 122, as follows: "It is generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances so far as they are relevant to construe and determine the character of the contract." It is obvious, however, that the subject-matter of each contract must be looked at as well as the residence of the contracting parties or the place where the contract is made. The place of performance is necessarily in many cases the place where the obligations of the contract

will have to be enforced, and hence, as well as for other reasons, has been introduced another canon of construction, to the effect that the law of the place of fulfilment of a contract determines its obligations. But this maxim, as well as the former, must of course give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases, no doubt, where a contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this *primâ facie* view is in its turn capable of being rebutted by the expressed or implied intention of the parties as deduced from other circumstances. Again, it may be that the contract is partly to be performed in one place and partly in another. In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard-and-fast rule by which to construe the multifarious commercial agreements with which in modern times we have to deal. In the present case the contract was made in London between merchants carrying on their business in the city of London, and payment was to be made in London. Presumably, therefore, we should infer that this was an English contract and intended to be governed by English law; but it still remains to be considered whether anything in the contract itself or the nature of its stipulations displaces this *primâ facie* view either wholly or in part. Now it cannot be contended that the parties have in express terms provided that any portion of this contract is to be construed or applied otherwise than according to English law; but it was suggested by the appellants that such an intention ought to be inferred from certain provisions as to the collection of the esparto in Algeria and as to its shipment thence. The esparto was to be shipped by the Compagnie Franco-Algerienne, or their agents, from Arzew, or any other port with safe anchorage, by sailing ships or steamers during the year 1881. The quality of the esparto was to be finally approved by the plaintiffs' representatives at the works of the Compagnie Franco-Algerienne, at Ain-el-Hadjar, in Algeria, before being baled, and no claim respecting quality was to be allowed after the delivery of the bales at Arzew. The necessary ships or steamers were to be supplied by the plaintiffs, otherwise the esparto was to be warehoused by the Compagnie Franco-Algerienne at the plaintiffs' peril and risk. Insurance was to be effected by the

defendants for the invoice amount at selling price, and 2 per cent over in the United Kingdom on the usual conditions. Payment to be made by cash on arrival of the ship or steamer at port of destination. Finally the contract contained an arbitration clause, with a provision that it should be made a rule of the High Court of Judicature on the application of either of the contracting parties.

There is absolutely nothing in any part of this contract, as it appears to us, which can amount to an indication that it is in any way or in any part of it to be treated as anything except an English contract, unless it be the mere fact that the esparto is to be collected in Algeria, approved at the works of a French company in Algeria before shipment, and to be delivered on board ships of the plaintiffs at an Algerian port, after which it is to be at plaintiffs' risk. To hold that on this ground only the ordinary presumption is to be displaced, and that the parties must have meant some law other than the English to govern the construction of any portion of the contract as regards the liabilities of the contracting parties, would be to introduce a serious element of uncertainty into mercantile contracts. The mere fact that a contract of this description, — made in England between English resident houses, and under which payment is to be made in England upon delivery of goods from up country in an Algerian port, — is partly to be performed in Algeria, does not put an end to the inference that the contract remains an English contract between English merchants, to be construed according to English law, and with all the incidents which English law attaches to the non-performance of such contracts.

Now one of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of which this is not one), a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by *vis major*.

“The rule laid down in the case of *Paradine v. Jane*, Aleyn, 27, has often,” says Lord Ellenborough, “been recognized in courts of law as a sound one; that when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract.” *Atkinson v. Ritchie*, 10 East, 530, at p. 533. See also *Spence v. Chodwick*, 10 Q. B. 530; *Lloyd v. Guibert*, Law Rep. 1 Q. B. 121. If inevitable necessity occurring in this country would not excuse non-performance, why should non-performance be excused on account of the inevitable necessity arising abroad? So to hold would be to alter the liability which English law attaches to contracts, and would, in the absence of an expressed or implied intention to that effect, be contrary to authority as well as principle, see *Barker v. Hodgson*, 3 M. & S. 267; *Sjoerds v. Luscombe*, 16 East, 201. The Solicitor-General, in his argument, admitted that he was driven to contend that the law of the place of fulfilment not merely governed the mode of performance of this particular contract,

but governed also the obligations in respect of performance, and the liabilities in respect of non-performance of it. It seems to us, however, that the true principles of construction to be applied do not admit of this interpretation of this contract. To what extent foreign law is to be incorporated in any contract must be, as we have said, a question of construction of the contract itself read by the light of the surrounding circumstances. If a contract made in England by English subjects or residents, and upon which payment is to be made in England, has to be performed in part abroad, it might not be unreasonable to assume that the mode in which any part of it has to be performed abroad was intended to be in accordance with the law of the foreign country, and to construe the contract as incorporating silently to that extent all provisions of a foreign law which would regulate the method of performance, and which were not inconsistent with the English contract. But it cannot be gathered from such a contract as the present that the parties desired to go further and to discharge the defendants from performance whenever circumstances arose which would, according to foreign law, excuse them. The contract has absolutely provided that delivery of the esparto shall be duly made, not that the bargain as to such delivery need only be observed when the foreign law would insist upon such observance. The contract being an English contract, only such portions of the French Civil Code can be applied to its provisions as to performance in Algeria as are not inconsistent with the express language of the contract as interpreted according to English law. If the parties had wished, in addition to this, to incorporate a provision of French law which in the event of *vis major* would operate to excuse the contracting parties for non-performance, and thus to vary the natural construction of the instrument according to English law, they should have done so in express terms. Read by English law the contract is not susceptible of such an interpretation, and there is nothing to show that in this respect the parties desired the contract to be governed by the French.

For these reasons we are of opinion that the judgment of the court below was right and must be affirmed with costs.

Judgment affirmed.

COX v. THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1832.

[*Reported 6 Peters, 172.*]

ERROR to the District Court of the United States for the Eastern District of Louisiana. This was an action against Cox and Dick, sureties on the official bond of one Hawkins, late navy agent of the United States, who died without accounting for large sums of money officially received by him. The District Court gave judgment for the United States.¹

THOMPSON, J. It is deemed unnecessary to notice the numerous and palpable errors contained in this record: that which arises from the entry of the judgment is insuperable. It is difficult to conceive, unless through mistake, how such a judgment could be entered. The demand in the petition is only fifteen thousand five hundred and fifty-three dollars and eighteen cents. The verdict of the jury is twenty thousand dollars; and upon this a judgment is entered up against the estate of John Dick and Nathaniel Cox jointly and severally for twenty thousand dollars and a judgment also against Nathaniel Dick and James Dick, for ten thousand dollars each. Upon no possible grounds, therefore, can this judgment be sustained.

There are, however, one or two questions arising upon this record, which have been supposed at the bar to have a more general bearing, which it may be proper briefly to notice. . . .

The proceedings in this cause, and the manner in which the judgment is entered, have been considered at the bar as affording a proper occasion for the court to decide whether this contract, and the liability of the parties thereupon, are to be governed by the rules of the civil law which prevail in Louisiana, or by the common law which prevails here.

It was contended on the part of the plaintiffs in error, that the United States were bound to divide their action, and take judgment against each surety only, for his proportion of the sum due, according to the law of Louisiana; considering it a contract made there, and to be governed in this respect by the law of the State.

On the part of the United States it is claimed that the liability of the sureties must be governed by the rules of the common law; and the bond being joint and several, each is bound for the whole; and that the contribution between the co-sureties is a matter with which the United States have no concern.

The general rule on this subject is well settled; that the law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the par-

¹ This short statement is substituted for that of the Reporter. Part of the opinion is omitted. — ED.

ties have a view to its being executed elsewhere ; in which case it is to be governed according to the law of the place where it is to be executed. 2 Burr. 1077 ; 4 Term, 182 ; 7 Term, 242 ; 2 Johns. 241 ; 4 Johns. 285.

There is nothing appearing on the face of this bond indicating the place of its execution, nor is there any evidence in the case showing that fact. In the absence of all proof on that point, it being an official bond taken in pursuance of an Act of Congress, it might well be assumed as having been executed at the seat of government. But it is most likely that in point of fact, for the convenience of parties, the bond was executed at New Orleans, particularly as the sufficiency of the sureties is approved by the district attorney of Louisiana.

But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the treasury department at the seat of government ; and the navy agent is bound by the very terms of the bond to pay over such sum as may be found due to the United States on such settlement ; and such paying over must be to the treasury department, or in such manner as shall be directed by the secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the city of Washington ; and the liability of the parties must be governed by the rules of the common law.

The judgment of the court below is reversed, and the cause sent back with directions to issue a *venire de novo*.

HEALY v. GORMAN.

SUPREME COURT, NEW JERSEY. 1836.

ant. [Reported 15 *New Jersey Law*, 328.]

THIS was an action of assumpsit on a promissory note dated in the city of New York, and payable at the State Bank in Elizabethtown, New Jersey. The CHIEF JUSTICE, on the trial at the Circuit, directed the jury to allow interest, at the rate of seven per cent, being the legal interest of the State of New York, where the plaintiff lived, and the contract was made. It was agreed by the counsel of the parties, that this question of the rate of interest should be moved, and argued at the

bar of the court, and if the direction of the CHIEF JUSTICE should be found wrong, then that the excess of interest should be deducted, and judgment be entered for the residue.

HORNBLOWER, C. J. I am satisfied that I was wrong in directing the jury to allow interest at the rate of seven per cent, the legal interest in the State of New York, instead of New Jersey interest, which is only six per cent.

Mr. Justice Story in his commentaries on conflicting laws, 241, § 291, says, "the general rule is, that interest is to be paid on contracts, according to the law of the place where they are to be performed, in all cases where interest is expressly or impliedly to be paid." In support of this rule the commentator refers to a great number of cases, both American and English.

Chancellor Kent in his commentaries (§ 39, p. 460, 461, 2d ed.), says: "The law of the place where the contract is made is to determine the rate of interest, when the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on lands in another State, unless there be circumstances to show that the parties had in view the law of the latter place in respect of interest; when that is the case, the rate of interest of the place of payment is to govern."

The note in question, though made in the City of New York, was in express terms to be paid at the Bank of Elizabeth, in this State. The contract did not carry interest upon the face of it, but upon default of payment at the day and place, the law of this State tacitly annexes an obligation thenceforth to pay interest until the debt is liquidated. But the obligation to pay interest was no part of the contract; for if the contract had been performed, no interest could have been demanded. It may be said, however, that it was; and that the understanding of the parties, and therefore in legal contemplation, a part of the New York contract, that if the money was not paid at maturity, it should then carry interest till paid. But the liability to pay interest in such case is rather a legal consequence than a conventional duty. The contract itself was for payment at a day certain. It did not contemplate a failure in the performance, and therefore made no provisions in anticipation of such an event, but left the law to take its course in case of a breach of the contract. Since, therefore, the event which gave rise to and legalizes the plaintiff's claim to interest happened in this State, or in other words, since it was here that the right to interest accrued, and by operation of our law that it becomes payable, the rate of interest must be such as is allowed in this State. (See Story on Conflicting Laws, fol. 245, §§ 294, 295.) The excess of interest must therefore be deducted, and judgment entered for the residue, pursuant to the agreement of the parties entered into at the Circuit.

FORD, J., and RYERSON, J., concurred.

Judgment for six per cent interest.

TARBOX v. CHILDS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1896.

[Reported 165 Massachusetts, 408.]

CONTRACT, to recover a balance of the purchase price for horses sold by the plaintiff to the defendants. Answer, payment. Trial in the Superior Court, without a jury, before BLODGETT, J., who reported the case for the determination of this court, in substance as follows.

The following facts were agreed. In May, 1893, the plaintiff, at Fredonia, in the State of New York, sold to the defendant Childs certain horses, and promised to deliver the horses at Fredonia. The defendant agreed to pay to the plaintiff one thousand dollars in cash at Fredonia, upon the delivery of the horses. The plaintiff forthwith delivered the horses to the defendant at Fredonia, but the defendant did not, at the time of delivery, pay anything towards the purchase price agreed upon. A few days later, the defendant sent by mail from Boston to the plaintiff at Fredonia \$675 in cash, to be applied on the purchase price. A few months later, the defendant sent to the plaintiff by mail from Boston to Fredonia his promissory note for \$325, payable at Boston in three months from date.

There was no agreement or understanding at any time between the parties as to whether that note or the renewal notes hereinafter mentioned should be accepted by the plaintiff in payment of the balance due or not, except such, if any, as can be implied from the facts herein set forth. When the first note became due, the defendant renewed it by another, which was the same as the first in all terms except the date. This renewal note was also sent by mail from Boston to Fredonia, and with it was sent a cash payment of the interest due on the first note to the date of maturity thereof. The plaintiff returned the first note, on request of the defendant, and retained the second note and the payment of interest.

No part of the principal thereof has ever been paid, nor any interest thereon. The plaintiff brought into court and tendered to the defendant the protested note, which tender was refused.

The agreed facts were the only evidence at the trial, with evidence of the law of the State of New York so far as the same was applicable to those facts.

The defendant Childs, who alone defended, objected to the admission of evidence of the law of New York, and requested the judge to rule that the effect of the delivery and receipt of the notes set forth in the agreed facts was to be determined solely by the law of this Commonwealth; and further requested the judge to rule as follows:—

“1. The question whether the first note is to be presumed to have been given in payment of the pre-existing debt or not is a question to be determined according to the laws of Massachusetts.

"2. Upon the agreed facts and the pleadings, it is to be presumed that the first note was given by the defendant and received by the plaintiff in payment and satisfaction of the pre-existing debt due the plaintiff for the purchase price of the horses.

"3. Upon all the evidence, the plaintiff is not entitled to recover.

"4. Upon all the evidence, it is to be presumed that the second note was given by the defendant and received by the plaintiff in payment of the first note."

The judge refused to give any of the rulings requested, and found for the plaintiff.¹

ALLEN, J. The defendant Childs contends that the notes given to the plaintiff were Massachusetts contracts, and that they should be interpreted and have effect according to the law of Massachusetts. That would be so if a question arose in an action upon the notes, or either of them. *Shoe & Leather National Bank v. Wood*, 142 Mass. 563. But the present action is brought on the original contract, and not on either of the notes. The plaintiff seeks to recover what the defendants agreed to pay him as the price of the horses sold. The defendants' promise was made in New York, and was to be performed there. They were bound to make payment in that State, and the question is whether they have done so. They paid a part in cash, and for the residue they sent by mail from Massachusetts to the plaintiff in New York their note made in Massachusetts and payable here. By the law of Massachusetts a negotiable note taken for an antecedent debt is deemed to be a payment, unless there is something to show a contrary intention. The rule in New York is the other way. The plaintiff in New York was not affected by the rule which prevails here. The defendant's promise to pay him in that State remained unperformed and undischarged, according to the law of that State. It makes no difference that successive notes were given. The plaintiff was to be paid there, and he has not yet been paid according to the law of New York, and is entitled to recover. *Vancleef v. Therasson*, 3 Pick. 12; *Rosseau v. Cull*, 14 Vt. 83; *Winsted Bank v. Webb*, 39 N. Y. 325; *Olcott v. Rathbone*, 5 Wend. 490. Story, *Conf. of Laws*, § 332.

*Judgment for the plaintiff.*²

¹ Part of the statement of facts is omitted. — ED.

² Where a note is given in payment at the place where the original debt was contracted and is payable, the question whether it is to be taken as a discharge of the original debt is of course to be determined by the law of the place. This is commonly said to be governed by that law because the note was there accepted as payment. *Bartsch v. Atwater*, 1 Conn. 409; *Thompson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 53 N. W. 1137; *Gilman v. Stevens*, 63 N. H. 342. — ED.

STEBBINS v. LEOWOLF.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1849.

[Reported 3 Cushing, 137.]

THIS was an 'action of assumpsit, — the declaration containing the common money counts, — brought by the plaintiffs, who were brokers in the city of New York, to recover of the defendant, also of New York, the sum of \$1,512.03, and interest, for commissions and differences, on the purchase and sale of certain stocks, made by the plaintiffs under the order and for the account of the defendant.¹

DEWEY, J. . . . Another ruling, to which an exception was taken, at the trial, was, "that if the contract for a portion of the shares matured on Sunday, the vendee had the whole of the Monday following in which to perform his contract; and that as to the shares purchased on the 1st of December, 1841, they having been purchased on a credit of sixty days, and the last of the sixty days falling on Sunday, the present action was prematurely commenced on the following Monday." This applies to only a portion of the shares embraced in the contracts of sale, but is deemed important, inasmuch as it is said to apply to all those shares which, in the view we have taken of the law, can be considered as so held and possessed by the vendors as to be the subject of a legal contract of sale and transfer at a future day.

This contract was entered into in the State of New York, was made by parties resident there, and to be performed there, and is therefore peculiarly to be governed by the rules of law of that State.

There has not been an entire uniformity in the various judicial tribunals, in their decisions, as to the time of performance of a contract, when the day of maturity on the face of the contract falls on a Sunday. But it is enough for the present purpose, that the law of the State of New York, upon this point, has become well settled. In the case of *Salter v. Burt*, 20 Wend. 205, it was held, that "when the day of the performance of contracts other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted, and a compliance with the stipulation of the contract on the next day (Monday) is deemed in law a performance." Such seems to be the rule of law in New York as to contracts. As to the computation of time, when a statute declares that an act shall be done within a certain number of days, and the last of these days falls on a Sunday, a different rule has prevailed. *Ex parte Dodge*, 7 Cow. 147. The case of *Alderman v. Phelps*, 15 Mass. 225, is to the same effect. As to so much of the claim of the plaintiffs as has its foundation in the contract made on the 1st of December, 1841, this action was prematurely brought, and for that reason, if for no other, the plaintiffs cannot recover for money paid on that contract.

¹ The statement of facts and part of the opinion are omitted. — ED.

BENNERS v. CLEMENS.

SUPREME COURT OF PENNSYLVANIA. 1868.

[Reported 58 *Pennsylvania*, 24.]

THIS was an amicable action of assumpsit to December Term, 1866, in which John Clemens was plaintiff and Isaac R. Benners, survivor of the firm of Isaac R. Benners & Co., defendant. The claim was for a balance due by defendant on an invoice of fruit, contracted for in England and shipped to defendant to New York. The whole amount of the shipment was \$2,967.85, which was reduced to \$896.95 by quercitron bark shipped to plaintiff. The plaintiff claimed to recover this balance at gold prices with interest from December 17th, 1863. The only question in the case was whether it was to be paid on that basis.¹

The verdict was for \$1,456.65, the whole amount of the plaintiff's claim. The defendant took a writ of error.

THOMPSON, C. J. The debt sued for was a debt contracted in England, or rather the balance of a debt contracted and partially liquidated there by returns in quercitron bark. In the absence of any understanding to the contrary the balance was due and payable there. This being so, it was payable in the legal currency of the country, denominated pounds, shillings, and pence, and the representative of gold. Of course, as any payment obtained here would be payable in legal tender notes, the value of the gold in legal tenders, with interest, would be what in amount the judgment should be. The *lex loci contractus* must control in interpreting the contract. *Allshouse v. Ramsay*, 6 Whart. 331; *Watson v. Brewster*, 1 Barr, 381, and authorities cited by the defendant in error. This view of the case is sufficient to affirm the judgment without reference to any question arising on our Legal Tender Acts. *The judgment being right in amount is affirmed.*²

GRAHAM v. FIRST NATIONAL BANK.

COURT OF APPEALS, NEW YORK. 1881.

[Reported 84 *New York*, 393.]

FINCH, J.³ The ownership of one hundred and ninety-six shares of stock, which stood upon the books of the Norfolk Bank, in the name of Eliza A. Graham, must be deemed vested in her, whether the purchase price was paid by her or by her husband, and notwithstanding

¹ Part of the statement of facts and arguments of counsel are omitted. — Ed.

² *Acc. Grunwald v. Freese* (Cal.), 34 Pac. 73; *Comstock v. Smith*, 20 Mich. 338; 8 Clunet, 447 (Brescia, 4 Nov. '78); 8 Clunet, 448 (Florence, 21 May, '70); 23 Clunet, 597 (Marseilles, 25 June, '95). — Ed.

³ Part of the opinion only is given. — Ed.

the evident control of it, for his own purposes, by the latter. No creditors of the husband intervene to affect the question, and, as between Mrs. Graham and the bank, her right as owner must be admitted. The dividends declared during such ownership belonged to and were payable to her; and, assuming for the present that her assignment to plaintiffs was effective to transfer such right to them, there remain for discussion only the two questions: whether the Norfolk Bank did, in fact, pay the dividends sued for to the husband of Mrs. Graham; and whether, by such payment to him, the liability of the bank to her was discharged. The referee has found that such payments were, in fact, made to James Graham, the husband. . . . While the facts are not free from difficulty, a careful examination has satisfied us that there was sufficient evidence to warrant the finding of the referee, and to make it conclusive on this appeal.

The question of law, however, remains, whether the payment by the bank to James Graham was a good payment to his wife in whose name the stock stood upon the books of the bank. The Norfolk Bank was located and transacted business in the State of Virginia. It is proved that in that State the common law prevails as it respects the relation of husband and wife, and that within that jurisdiction the husband has the absolute right to reduce to his own possession, and use for his own benefit, the personal property of the wife. The contract out of which grew the right to the dividends was both made and to be performed in Virginia, and if the payment by the Bank of Norfolk to James Graham is to be tested and measured by the law of that State, it is conceded to have been good and an effective discharge of the liability to the wife. It is denied, however, that the law of Virginia applies, and it is argued that the law of Maryland, the *lex domicilii*, governs and controls the capacity of the parties to receive payment, and the duty of the bank in making it. The general subject of a conflict between the law of the domicil and that of the place of contract has been fully discussed by Story and Wharton in their respective treatises. Story on Conflict of Laws, § 374 *et seq.*; Wharton, § 393 *et seq.* Whatever is useful in the learning of the continental jurists, or the decisions of the English courts, has been made tributary to conclusions which we may safely follow where, at least, they are in harmony with the ruling of our own tribunals. It must, then, be granted that movables or personal property, by a fiction of the law, are deemed attached to the person of the owner, and so, present at his domicil, whatever their actual situation may be. The law of the domicil, therefore, naturally governs their transfer by the owner, and their disposition and distribution in case of his death. So far the authorities substantially agree, differing only in the reasons upon which the rule is founded, and by which it is to be justified. When, however, the question passes beyond the disposition of the personal property by the party, or the act of the law, within the jurisdiction of the domicil, and busies itself with the inherent character of the property, and of the contracts which both create and constitute

it, elements of discord arise, and the authorities are not easily to be reconciled. It is readily seen that the inherent character of the contract must usually be the product of the jurisdiction in which it originates, and hence it follows, and has been justly held, that the construction, nature, and effect of a contract are to be determined by the *lex loci contractus*. Story on Conflict of Laws, § 321. But no such question is here. There is no dispute about the construction of the contract to pay dividends. All are agreed upon that. There is no trouble as to the nature of the contract or its effect. Its validity, and the duty of payment to the stockholders, is conceded on all sides. The real question is over the performance of the contract, or its discharge by payment; and that involves the capacity of the husband to receive and discharge the debt, represented by the dividends, *jure mariti*. On the one hand, it is argued that this question of capacity, of the rights and powers flowing from the marriage relation, is dependent upon the law of the domicil, and utterly unaffected by the foreign law, and the former must, therefore, dictate and measure the authority and power of the husband and the right of the wife. That is, in general, true as between themselves, and relatively to each other. It does not follow that it is true as between them and a debtor in another State, whose contract was made there, and is there to be performed. Such a fact introduces a new element into the problem. It would scarcely be endurable if a railroad or insurance company, declaring dividends in this State, should be bound to pay stockholders in other States according to the foreign laws, and in accordance with different and varying codes. Observing the evil result, we must remember that, in a case like the present, it is a legal fiction which attaches the property to the domicil, and the actual fact may be otherwise. Judge Comstock, in Hoyt v. The Commissioners of Taxes (23 N. Y. 228), well says, "that the fiction or maxim, *mobilia personam sequuntur*, is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action." And Judge Story says that the legal fiction "yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined." Conflict of Laws, § 550. And hence has been very steadily sustained the general rule that a contract made in one State, and to be performed there, is governed by the law of that State, and the further rule, which is a logical result, that a defence or discharge, good by the law of the place where the contract is made or to be performed, is to be held, in most cases, of equal validity elsewhere. Story on Conflict of Laws, § 331; Thompson v. Ketcham, 8 Johns. 189; Bartsch v. Atwater, 1 Conn. 409; Smith v. Smith, 2 Johns. 235; Hicks v. Brown, 12 Johns. 142; Sherrill v. Hopkins, 1 Cow. 103; Peck v. Hibbard, 26 Vt. 702; Bowen v. Newell, 13 N. Y. 290; Cutler v. Wright, 22 N. Y. 472; Waldron v. Ritchings, 3 Daly, 288; Jewell v. Wright, 30 N. Y. 259; Willits v. Waite, 25

N. Y. 577. In these cases the fiction yields to the fact; the situs attached theoretically to the person of the owner, and, therefore, to his domicile surrenders to the actual situs where justice and convenience demand it. The illustrations are various, but founded upon a common reason and justification. For the purpose of taxation the actual situs controls, and the fiction which carries the personal property to the domicile of the owner is disregarded. As to days of grace affecting the maturity of a contract and determining when it becomes due, the *lex loci* is applied. The defence of infancy is to be sustained or denied according to the rule of the place of contract and performance. So, also, as to the disability of coverture, and the rate and legality of interest. And even an assignment, *in invitum*, compelled by the local law, will transfer property in another State where suitors in the courts of the latter are not thereby prejudiced. These rulings and others of the like character have been modified and moulded in their application by the influence of varied circumstances, but concur in the general principle upon which the *lex loci* has been applied. The point pressed here is that while it controls the construction and validity of the contract, it does not settle the capacity of the non-resident parties. But to found a ruling upon such a test would involve us in an ambiguity. Capacity may affect the power of transfer and the direction and details of distribution. In that respect it is often shaped and settled by the law of the domicile. But it also affects the validity of a contract and the mode and manner of its dissolution or discharge. In that respect it is generally governed by the law of the place of contract. Story concludes, after a full and learned review of the insuperable difficulties which attend an effort to extend the capacity or incapacity created by the law of the place of domicile to foreign States, that the true rule is that "the capacity, state, and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired, and contracts made in the place of their domicile, touching property situate therein," but as to acts done, etc., elsewhere, the *lex loci contractus* will govern in respect to capacity and condition. We cannot make, therefore, the law of the domicile in and of itself a solvent of the doubts and difficulties likely to arise even as to questions of capacity. In the present case the contract was made in Virginia and to be performed there. The dividends were there declared and payable. They were paid to the husband who could lawfully receive and appropriate them, by the law of Virginia, to his own use and benefit. The payment was, therefore, valid and effectual, and discharged the bank from its liability. The rights of the wife after such payment, as between herself and her husband under the law of Maryland, might prove to be a very different question. It is sufficient for the purposes of this case that the payment, which the referee finds was in fact made to the husband, discharged the liability of the bank and furnished a defence to the action.

The judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

THE QUEEN v. OGILVIE.

EXCHEQUER COURT OF CANADA. 1897.

[*Reported 6 Canada Exchequer, 21.*]

DAVIDSON, J.¹ The Crown by information, dated September, 1895, prayed judgment for \$77,337.03 as balance due under a letter of guarantee signed by defendant on the 11th of May, 1883. At the trial the claim was reduced to \$65,820.88. The defendant pleads that he stands wholly discharged by payments made by the principal debtor subsequent to, and imputable in extinction of, his suretyship.

Financial difficulties, which ultimately resulted in liquidation, compelled the Exchange Bank of Canada to apply to the Finance Department of Canada for assistance. This was granted on three several occasions, in the hope of saving the institution from insolvency. On the 12th of April, the 21st of April, and the 12th of May the Government made deposits of \$100,000 each, and in acknowledgment thereof were delivered receipts bearing the numbers 323,329 and 346. . . .

The third deposit . . . was . . . made, upon the Department being placed in possession of the following letter from defendant, who was at the time one of the directors of the bank : —

“ OTTAWA, 11th May, 1883.

“ MY DEAR SIR, — I beg that the Government will place a further sum of \$100,000 at deposit with the Exchange Bank on the same terms as the former deposits of \$200,000, and on the Government agreeing to comply with the request I hereby undertake to hold myself personally responsible for the further deposit of \$100,000.

“ Yours very truly,

“ A. W. OGILVIE.

“ J. M. COURTNEY,

“ *Deputy Minister Finance.*”

The check covering this deposit, for which a receipt bearing the number 346 issued, was delivered to defendant and by him brought to Montreal. Verbal evidence was made at the trial to the effect that it was an express condition and agreement precedent to the check being delivered over to the bank authorities, that all future payments to the Government should be first applied in extinction of the amount for which the defendant had thus become surety. . . .

Later, the deputy minister wrote as follows : —

“ FINANCE DEPARTMENT, OTTAWA, 7th July, 1883.

“ SIR, — Referring to previous correspondence, I have now the honor to request that you will be good enough to forward to me (at your very earliest convenience) a receipt for the \$50,000 which was to

¹ Part of the opinion only is given. — Ed.

be turned into cash on the 1st instant, and also a fresh receipt for \$50,000 at interest and I will return you one of the receipts for \$100,000 which we now hold. Pray attend to this without delay.

"I have, etc.,

"J. M. COURTNEY,

"*Deputy Minister Finance.*

"THOS. CRAIG, ESQ.,

"*Managing Director Exchange Bank, Montreal.*"

Much, if not the whole of the controversy existing between the parties, results from the terms in which answer was made on behalf of the bank. These are its words:—

"EXCHANGE BANK OF CANADA, MONTREAL, 9th July, 1883.

"*The Deputy Minister of Finance, Ottawa.*

"DEAR SIR, — As requested in your letter of the 7th instant, I now forward the deposit receipt of this bank, No. 358, in favor of the Hon. the Receiver-General for \$50,000, and enclose our receipt for \$50,000, placed to the credit of the Finance Department account. Please return deposit receipt No. 323, \$100,000, now in your possession, and oblige.

"Yours, etc.,

"JAMES M. CRAIG,

"*Pro Manager.*"

James M. Craig was the accountant of the bank. It will be remembered that No. 323 was the earliest in date of the three receipts held by the Government. It was returned to the bank, as requested. . . .

Aware of the payment of \$100,000 and in the apparent belief that his liability had been discharged, defendant pressed the bank for the return of his letter of guarantee. So on the 10th of November, the president wrote to Mr. Courtney in these terms:—

"Concerning the loans we obtained from you last spring for the last \$100,000 which you gave us, you obtained from Mr. Ogilvie his guarantee for the payment of the \$100,000. As we paid you this last amount, and the deposit receipts have been returned to us, I will be obliged to you if you will kindly return to me Mr. Ogilvie's guarantee letter." . . .

Mr. Courtney took the opinion of the Department of Justice and refused to return the letter of guarantee. The present action was only entered twelve years later. The bank suspended payment on the 17th of September, 1883. . . .

The defendant . . . contends that any amount in which he was ever responsible towards Her Majesty has been paid; that the sums received on her behalf ought to have been imputed on the sum of \$100,000, in connection with which he gave his guarantee; that James M. Craig in asking for the return of the first receipt, No. 323, in connection with the repayment of \$100,000 acted in contravention of the agreement between the bank and the defendant, in error, and without the knowl-

edge of and contrary to the instructions of his employers; that the claim is prescribed.

The plea of prescription was not seriously argued at the trial. Prescription has not inured.

English and French authorities were cited at the Bar, on either side, in sustainment of the legal principles relating to imputations or appropriation of payments and to other features of the case which it was desired to uphold.

In case of conflict, which is to prevail as to the issues before me — the law of Ontario or of this province? The common or the civil law? The question needs a definite reply, because defendant signed and delivered his letter to Mr. Courtney, at Ottawa, and there received in return the check for \$100,000. But the place of the bank's applications, of the payment of the Government checks, of the deposits, of the giving of the receipts and of the repayments, was Montreal. When a contract is made in one country and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, is the law of the country where the performance is to take place (Dicey, *Conflict of Laws*, 570). I must therefore give dominant weight to the law of suretyship as it exists in this province. . . .

Whether it is held that the specific imputation in favor of the surety, which was intended by the bank, ought to replace the unauthorized and mistaken acts of James Craig, or that the plaintiff and defendant are to be left to the application of legal imputation, makes no difference as to results. For if neither party made election as to the specific debt on which the payments were to be applied, they would go in discharge of the one which was the most onerous. The civil law deems that debt to be most onerous to which a suretyship is attached, for the reason that the debtor by one payment discharges two creditors representing principal and accessory obligations. Ponsot, *Cautionnement*, no. 343; 17 Laurent, no. 619; Roll. de Vill. vo. *Imputation*, v. 5, p. 170, no. 33; Pothier, *Obligations*, no. 530. . . .

*Judgment for defendant, with costs.*¹

¹ Reversed on the facts, without dissenting from the statements of law, 29 Can. 299. — Ed.

SECTION VIII.

DISCHARGE.

GIBBS v. SOCIÉTÉ INDUSTRIELLE.

COURT OF APPEAL. 1890.

[*Reported 25 Queen's Bench Division, 399.*]

LORD ESHER, M.R.¹ In this case the defendants, a French company, entered into negotiations for the purchase of copper through a London metal-broker, who effected contracts between them and the plaintiffs in England in the ordinary way. He drew up bought and sold notes, by which the contract was expressed to be according to the rules of the London Metal Exchange. One of these notes he sent to the plaintiffs, and the other he sent to the defendants; and both parties retained the notes so sent to them. The contracts were for the purchase of copper to be delivered in England. It appears to me impossible to deny that these were English contracts. The contracts being so made, the defendants became bound to accept the copper contracted to be sold. The plaintiffs were always ready and willing to deliver the copper; but the defendants were not ready to accept, and absolved the plaintiffs from tendering it. Consequently, according to English law, the plaintiffs are entitled to sue the defendants for non-acceptance of the copper, the measure of damages being the difference between the contract and market price at the time of the breaches of contract. But the defendants are a French company domiciled in and governed by the law of France. They have been, by a judgment of the Tribunal of Commerce of the Seine, pronounced to be in judicial liquidation. It was asserted by the defendants by way of defence to the action that the pronouncing of that judgment by the French tribunal by the law of France operated as a discharge of the defendants from liability to an action on the contracts; and it was asserted that it so discharged them in more than one way. It was said that such a judgment dissolved the French company, so that it no longer existed, and so dissolved their liability to be sued on the contracts. It was further said, that the fact of the plaintiffs having by their agents offered proof of their claims before the French tribunal operated as a discharge of the defendants' liability to this action. It was further said, as to part of the claim, that by the law of France, where a company is in liquidation as in the present case, and there is a contract for the acceptance of goods by

¹ Part of this opinion only is given. Concurring opinions were delivered by LINDLEY and LOPES, L.JJ. — ED.

such company at a date subsequent to the judgment of liquidation, the vendors cannot prove for damages for the non-acceptance; they can elect to deliver the goods to the liquidator and prove for the price; but, if they do not so elect and the goods are not delivered, the effect is that the contract is cancelled and the purchasers discharged. Such are the contentions set up by the defendants by way of defence. Then they raise a further point. They say that the judgment against the defendants ought not to have been pronounced, but the judge ought to have stayed the proceedings before judgment, or that, on giving judgment, he ought to have stayed further proceedings generally. The plaintiffs contend, that there was no discharge of the defendants from their obligations under the contract, according to the law of France; but they go further, and contend that, assuming that there was such a discharge by reason of the liquidation proceedings, and that such discharge was for this purpose equivalent in France to a discharge in bankruptcy according to English law, yet such discharge would be no answer to an action in England upon an English contract. We have to decide the questions so raised, or such of them as it may be necessary to decide for the purposes of this case. The question really is, whether anything has been proved which is an answer to the plaintiffs' action in this country according to the law of England. It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. I say "applicable to it as a contract" to exclude mere matters of procedure, which do not affect the contract as such, but relate merely to the procedure of the court in which litigation may take place upon the contract. The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought. That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the

country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said, in *Smith v. Buchanan*, 1 East, 6, it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied. The proposition contended for seems to me to contravene the general principle to which I have alluded as governing these matters, and to suggest a principle for which there is no foundation in law or reason. Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound? Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract. I should say, too, that, if the contract had been made in any foreign country other than France, the plaintiffs could sue upon it in this country, and their action would not be affected by the law of France. In that case the law of such other foreign country would govern the contract. That would be the conclusion I should come to, even supposing that the propositions stated by the defendants as to the law of France were in fact made out. It is not necessary, in the view I take, to determine whether they were or not. I must say that I do not think it was clearly made out that, in any of the modes suggested, the defendants were by the law of France discharged from liability. I wish to base my judgment, however, on the assumption that they were so discharged. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the country of their domicile is altogether outside the general principle that governs such matters, and cannot be supported.¹

¹ *Acc.* *Blanchard v. Russell*, 13 Mass. 1; *May v. Breed*, 7 Cush. 15; *Smith v. Smith*, 2 Johns. 235. — *Ed.*

FELCH v. BUGBEE.

SUPREME JUDICIAL COURT OF MAINE. 1859.

[*Reported 48 Maine, 9.*]

KENT, J.¹ The questions between the plaintiff and the principal defendants relate to the effect of a discharge in insolvency, granted to the defendants by the proper tribunal under the laws of Massachusetts. It appears from inspection of the papers that the discharge was regularly granted, and, by its terms, includes the contract as set forth in each of the notes in suit. The question arises, whether such a discharge is effectual to bar this action.

Both notes were made in Boston, payable to defendants' own order, signed and indorsed by them to citizens of Massachusetts, who, at Boston, negotiated and sold them to the plaintiff, before maturity, and before the commencement of proceedings in insolvency. The first of these notes contains no specification of any place of payment; the second is payable at any bank in Boston. . . .

The second note . . . is made payable at any bank in Boston; and it is contended that this stipulation takes the case out of the principles of the former decisions, and makes it subject to the discharge offered in evidence; and that a contract, although with a citizen of another State, is barred if it is payable in the State where the debtor resides and has obtained his discharge.

The other questions being disposed of, the only remaining one is, whether the fact that the note is made payable in Massachusetts gives efficacy to the discharge, although the contract is with a citizen of another State.

We will first consider the authorities bearing on this precise point.

In *Scribner v. Fisher*, 2 Gray, 43, a majority of the court in Massachusetts decided that such a note is barred by a discharge in insolvency in that State. This decision has been reaffirmed in several cases decided subsequently in that court. 5 Gray, 539, and note. No reasons are assigned in the subsequent cases. They rest on the case of *Scribner v. Fisher*, in which Metcalf, J., gave a dissenting opinion. But this is now established as the doctrine of that court.

In the case of *Demerit v. Exchange Bank* (Law Reporter, March, 1858), Judge Curtis held, "that it is not competent for the State of Maine, under the Constitution of the United States, to pass any law discharging or suspending the right of action on a contract made with a citizen of another State by a citizen of Maine. This was settled in *Ogden v. Saunders*, 12 Wheat. 213, and *Boyle v. Zacharie*, 6 Pet. 348." "It is urged," says Judge Curtis, "that where the contract is to be performed in the State, it is not within *Ogden v. Saunders*. It

¹ Part of the opinion only is given. — Ed.

has been so held in *Scribner v. Fisher*, 2 Gray, 43. But I cannot concur in that opinion. I consider the settled rule to be that a State law cannot discharge or suspend the obligation of a contract, though made and to be performed within the State, when it is a contract with a citizen of another State. Such was Justice Story's understanding of the decisions of the Supreme Court of the United States in which he took part. *Springer v. Foster*, 2 Story, 387."

Mr. Justice Story has also expressed the same view of the law in his elementary works. In his *Conflict of Laws*, § 341, he says, "that a discharge under any law of the State where made will not operate to discharge any contracts except such as are made between citizens of the same State." *Very v. McHenry*, 29 Maine, 214.

The Court of Appeals in New York, in 1852, in the case of *Donnelly v. Corbett*, 3 Seld. 500, had this precise question before them,—the contract being payable in South Carolina, where the debtor resided and was discharged,—the creditor being of New York. The court held that an action on the contract was not barred by a discharge. The ground of the decision was, that a discharge, under a State insolvent law, of a debtor from his debts contracted after its passage, is valid as respects contracts between citizens of the State, but invalid as to all contracts where a citizen of another State is a party. The same doctrine is found in *Poe v. Duck*, 5 Md. Rep. 1.

In *Anderson v. Wheeler*, 25 Conn. 613, the case presented the same question as the one before us,—the original parties to the note were both of New York, it was indorsed before due to a citizen of Connecticut, it was payable at a bank in New York, where the payee obtained his discharge in insolvency. The court refers to the case of *Scribner v. Fisher*, but dissents from it, and decides that the fact of the place of payment being designated does not take it out of the rule as laid down in Judge Johnson's opinion, concurred in by a majority of the court, in *Ogden v. Saunders*.

We have also the opinion of Mr. Justice Baldwin of the Supreme Court of the United States, in the case of *Woodhull v. Davis*, Baldwin's Rep. 300. His decision is based on the position that bankrupt or insolvent laws can have no extraterritorial effect on persons beyond the limits of the State or nation.

The decisions which are in opposition to the cases in Massachusetts rest upon the understanding of the doctrine in the original case of *Ogden v. Saunders*. All the courts, including that of Massachusetts, state and national, agree, as a starting-point, that whatever is clearly and expressly decided in that case is to be taken as settled, although the reasoning may not be entirely satisfactory. That case, indeed, resembles the works of some ancient authors, where the commentaries, and doubts, and explanations outrun the text and overwhelm it, leaving the bewildered student "in wandering mazes lost,"—ofttimes the "interpreter being the harder to be understood of the two."

Mr. Justice Woodbury, in the case of *Town v. Smith*, 1 Wood. &

Minot, 137, discusses fully the authorities bearing on the whole question, and, although doubting some of the views, and the soundness of the reasoning on which they are based, yet feels bound by the authority of the cases in the Supreme Court of the United States, which he understands as establishing the test of citizenship of the parties.

The discussions and decisions, have, however, resulted in bringing about a general agreement as to all the points first enumerated, leaving this single point of the place of performance yet, in a measure, in controversy.

The Supreme Court of the United States was called upon to revise and interpret the leading case of *Ogden v. Saunders*, and the judges gave their opinions on the various questions raised, in *Cook v. Moffat*, 5 How, 309. Whilst there is an almost painful difference of opinion on the question of the soundness of the grounds assumed or reasons assigned, the court concurs in fixing certain principles as finally established. The one bearing on the exact point before us is thus stated: "A certificate of discharge under an insolvent law will not bar an action brought by a citizen of another State, on a contract with him."

This is the state of the authorities on the subject. The preponderance seems clearly against giving efficiency to the discharge in a case like this.

If we leave the authorities and seek beyond them for the reasons on which any rule on this subject is founded, we find two trains of argument, which, starting from different premises, lead to directly opposite results. The whole controversy on this point seems to turn upon the question whether it is the contract itself, including the place of making and of performance, and the *lex loci contractus*, that is to govern, or whether the citizenship of the contracting parties controls, without reference to the nature or place of making or performance of the contract.

It is urged by those who favor the first view, that, when a foreigner, or a citizen of one State, voluntarily comes into another State, and there makes a contract with a citizen of the latter State, not by its terms to be performed elsewhere, the *lex loci* attaches to the contract, and must not only govern its construction, but its validity, and the grounds or facts by which it may be discharged. The argument is, that every contract made has relation to the existing law of the State, and (to apply the doctrine directly to the case before us) that, when such a contract is made within the territorial jurisdiction of Massachusetts, the liability to a discharge under the existing insolvent laws becomes a part and parcel of that contract, incorporated into it, or attached to it, as a condition or limitation, and goes with it everywhere, whoever makes or becomes a party to it, at any time. In this view, citizenship is of no consequence. The ground on which insolvent laws of a State, which allow a full discharge of a contract, are sustained against the objection that they impair the obligation of contracts, and thus violate the provision of the United States Constitution, is that above stated, viz.: that the liability to such discharge is either

expressly or tacitly understood by the parties, as a part of, or a fixed attendant upon, all contracts made under the overshadowing canopy of the statute of insolvency; and that any citizen of another State, who comes voluntarily within the territory thus embraced, must be held to contract with reference to the law, and that the enforcement of it would not violate his rights.

If this were a new question, this view of the case would certainly be entitled to great consideration. It will, however, be observed, that the strength of this argument rests upon the doctrine of the *lex loci contractus*, the place of *making* the contract, not the place of *performance* only or chiefly. It is the fact of making a contract on a territory governed by a certain law that incorporates the law into it, if it is thus incorporated. And it would seem, that if it is not citizenship, but place, that is to control, those who favor this view should have taken their stand upon the ground that every contract made in the State, and not expressly to be performed elsewhere, must be governed by the existing law. But this has been given up by all the courts. Even the court in Massachusetts admits that the fact that the contract was made in that State cannot bar recovery, after a discharge in insolvency. The place of making is treated as immaterial. *Dinsmore v. Bradley*, 5 Gray, 487; *Houghton v. Maynard*, 5 Gray, 552; 10 Met. 694, and numerous other cases. The same court has decided that a contract made in Georgia, and there to be performed, between two citizens of Massachusetts, would be barred by a discharge in Massachusetts. *Marsh v. Putnam*, 3 Gray.

The question naturally arises, why the place of performance of a contract should subject it to the operation of a discharge, when the place of its formation would not. If the place of performance is material, and must control, it must be because the party out of the State voluntarily assented to the condition fixing the place, thereby bringing the contract under the law of the State. The same reasoning would apply to the making of a contract which might be performed in the State. When the fact of the place of making the contract is not regarded as essential, the citadel, as it seems to us, is surrendered, and it is vain to attempt to make a stand upon the place of performance alone.

It is conceded by the court in Massachusetts that the forum makes no difference; that the same rule applies everywhere. And, after a careful consideration of the reasonings and decisions of the court on this vexed subject, we can only say that, if the question were an open one in all respects, we might incline to the doctrine that the place of making and the place of performance should control, on the grounds before stated, rather than the fact of naked citizenship. Yet we are forced to the conclusion that a different rule has been finally established by the Supreme Court of the United States, and concurred in by most of the State courts, and we are not disposed to depart from the rule thus established. That rule is the one found in *Cook v. Moffat*, 5 How.

before cited. It rests entirely upon the citizenship of the party, and not at all upon the place of making or performance. It is the result of that train of reasoning which regards the insolvent laws of a State as local, having no extraterritorial force so as to act upon the rights of citizens of other States; and which holds that, as between citizens of the State, the discharge will bind them as to all posterior contracts, wherever made or wherever to be executed; and, as to citizens of other States, will not discharge any existing contract, although made or to be performed in the State granting the discharge. Or, as expressed by the court, the discharge is not a bar "when the action is brought by a citizen of another State." This rule is broad enough to exclude all questions arising from either the place of making or place of performance. It rests entirely on the citizenship of the parties, and treats all other matters as immaterial.

*The plaintiff must have judgment on both notes.*¹

PHŒNIX NATIONAL BANK v. BATCHELLER.¹

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1890.

[Reported 151 *Massachusetts*, 589.]

HOLMES, J. This is an action by a Rhode Island national bank, upon a promissory note payable in Massachusetts, and made here by the defendants, citizens of this State. The defence is a discharge in insolvency in this State. It is admitted that the plaintiff did not prove its claim upon the note, and the only question is whether, under these circumstances, the discharge is a bar. It was argued for the defendants, that the decisions of the Supreme Court of the United States that discharges in such cases are not generally valid against citizens of other States do not go upon any constitutional ground, but upon mistaken views of what is called private international law, and therefore are not binding upon us; and we were asked to reconsider *Kelley v. Drury*, 9 Allen, 27, in which this court yielded its earlier expressed opinion, and followed the precedent of *Baldwin v. Hale*, 1 Wall. 223. See also *Guernsey v. Wood*, 130 Mass. 503; *Maxwell v. Cochran*, 136 Mass. 73.

There is no dispute that the letter of the discharge and of our statute covers the plaintiff's claim; Pub. Sts. c. 157, §§ 80, 81; and the argument in favor of giving them effect according to their letter is, that unless the statute is void we are bound to follow it; that the law of the

¹ *Acc.* *Baldwin v. Hale*, 1 Wall. 223; *Rhodes v. Borden*, 67 Cal. 7, 6 Pac. 851; *Anderson v. Wheeler*, 25 Conn. 603; *Hawley v. Hunt*, 27 Ia. 303; *Newmarket Bank v. Butler*, 45 N. H. 236; *Phelps v. Borland*, 103 N. Y. 406; *Main v. Messner*, 17 Or. 78, 20 Pac. 255; *Roberts v. Atherton*, 60 Vt. 563, 15 Atl. 160. — ED.

place where the contract is made and is to be performed, which is in force at the time of making and for performing it, enters into the contract so far as to settle everywhere what acts done at that place shall discharge it (*May v. Breed*, 7 Cush. 15); and that a discharge in accordance with that law cannot be said to impair the obligation of a contract which contemplated it, or to deprive the contractee of property without due process of law when that property was created subject to destruction in that way.

We express no opinion upon the weight of this argument. Although it formerly prevailed with this court (*Scribner v. Fisher*, 2 Gray, 43; *Burrall v. Rice*, 5 Gray, 539), it may be that there is a distinction as to a discharge by legal proceedings. It may be that statutes providing for a discharge by an insolvency court do not enter into the contract in such a sense as to bind the contractee to adopt and submit himself to the jurisdiction as an implied condition of the promisor's undertaking. It does not follow, because the discharge, if effective, does not impair the obligation of the contract, that absolute liability to it is a part of the substantive obligation. The substantive promise and the obligation of the contract are different things; and apart from this consideration it may be that by sound principle the plaintiff is to be taken to have subjected itself to Massachusetts proceedings only to the extent that, if the Massachusetts courts could acquire jurisdiction over it in the ordinary modes by which jurisdiction of the person is acquired, it would be bound everywhere by a discharge granted here.

However this may be, we see no sufficient reason for departing from what has been accepted as the law for a quarter of a century. We agree that, consistently with our duty, we cannot yield our opinion upon new questions not subject to the final jurisdiction of the Supreme Court of the United States solely out of a desire for uniformity. But when we are asked to overrule a decision of our own court which has been acquiesced in for so long, we should have to be very sure, before doing so, not only that the decision was wrong, but also that the Supreme Court of the United States, whatever we may think about it, either would not regard our decision as subject to review by them, or would abandon opinions which they have expressed repeatedly, and down to the latest volume of their reports.

We should hesitate to overrule *Kelley v. Drury*, even if we were ready to say that we disagreed with the principle of *Baldwin v. Hale*, and that we thought our decision not subject to review. For when in a particular case the precedents are settled in favor of uniformity, the fact that they do conform to the decisions of the Supreme Court of the United States is a most powerful secondary reason for not disturbing them, and would be likely to outweigh our private opinions upon the original matter. There is, too, a particular reason for uniformity in the present case, because it is manifest that, practically at least, the general validity of the discharge, that is, its effect outside this Commonwealth, depends upon the decision of other courts than this, and

that the decision of the United States Court upon that question is of more importance than that of any other.

The often repeated view of the Supreme Court of the United States is, that discharges like the present are void for want of jurisdiction, and that statutes purporting to authorize them are beyond the power of the States to pass. *Baldwin v. Hale*, 1 Wall. 223, 233; *Baldwin v. Bank of Newbury*, ib. 234; *Gilman v. Lockwood*, 4 Wall. 409; *Denny v. Bennett*, 128 U. S. 489, 497; *Cole v. Cunningham*, 133 U. S. 107, 115. Whether that court would regard a decision to the contrary by a State court as subject to review by them upon constitutional grounds, does not appear very clearly from any language of theirs which has been called to our attention, unless it be the following, repeated in *Baldwin v. Hale*, 1 Wall. 223, 231, from *Ogden v. Saunders*, 12 Wheat. 213, 369: "But when, in the exercise of that power, the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States and with the Constitution of the United States." This is somewhat emphasized as the deliberate view of the court, not only by its original mode of statement, but by their adhesion to it after the dissent of Chief Justice Taney in *Cook v. Moffat*, 5 How. 295, 310. See *Scribner v. Fisher*, 2 Gray, 43, 47.

This language certainly gives the impression that our decision would be regarded as subject to review, possibly on the ground of an implied restriction on the power to pass insolvent laws reserved to the States (*Denny v. Bennett*, 128 U. S. 489, 498); possibly on the ground that the discharge would impair the obligation of contracts with persons not within the jurisdiction (*Cook v. Moffat*, 5 How. 295, 308); possibly by reason of the Fourteenth Amendment (*Pennoyer v. Neff*, 95 U. S. 714); possibly on some vaguer ground. We feel the force of the reasoning quoted from *Stoddard v. Harrington*, 100 Mass. 87, 89, but that case did not profess to weaken the authority of *Kelley v. Drury*, and, moreover, the question which we are now considering is not what would be our own opinion, but what seems to be the opinion of the Supreme Court of the United States.

The decision in *Kelley v. Drury* did not go upon any nice inquiry whether it was subject to review, but upon the ground that this court deferred to the decision of the Supreme Court of the United States, that discharges like the present were not binding outside the jurisdiction, and that, this being so, a discrimination should not be made in favor of our citizens in proceedings in the State court in distinction from proceedings in the courts of the United States.

This last proposition was conceded by the senior counsel for the defendant. But as some doubt was thrown upon it in the printed brief, we repeat what was again intimated in *Murphy v. Manning*, 134 Mass. 488, that there is nothing in the law affecting the question before us

which indicates an intent to refuse foreign creditors access to the courts of Massachusetts as a merely local rule of procedure, or otherwise than as a consequence of the substantive right having been barred by the discharge. The form of the discharge in the Pub. Sts. c. 157, § 80, and the language of § 81, address themselves directly to the substantive right, and declare the debtor discharged from the specified debts. It being settled that the plaintiff's debt is not barred, an action can be maintained to recover it in a State court.

CANADA SOUTHERN RAILWAY v. GEBHARD.

SUPREME COURT OF THE UNITED STATES. 1883.

[*Reported 109 United States, 527.*]

SUITS (commenced in the Supreme Court of the State of New York and removed to the Circuit Court of the United States for the Southern District of New York), by holders of mortgage bonds of the Canada Southern Railway Company, and of extension bonds, to recover on their extension bonds and on the interest coupons on their mortgage bonds. The following are the facts as stated by the court:

What is now known as the Canada Southern Railway Company was originally incorporated on the 28th February, 1868, by the legislature of the Province of Ontario, Canada, to build and operate a railroad in that province between the Detroit and Niagara rivers, and was given power to borrow money in the province or elsewhere and issue negotiable coupon bonds therefor, secured by a mortgage on its property, "for completing, maintaining, and working the railway." Under this authority the company, on the 2d of January, 1871, at Fort Erie, Canada, made and issued a series of negotiable bonds, falling due in the year 1906, amounting in all to \$8,703,000, with coupons for semi-annual interest attached, payable, principal and interest, at the Union Trust Company, in the city of New York. To secure the payment of both principal and interest as they matured, a trust mortgage was executed by the company covering "the railway of said company, its lands, tolls, revenues present and future, property and effects, franchises and appurtenances." Every bond showed on its face that it was of this kind and thus secured.

Before the 31st of December, 1873, the company became satisfied that it would be unable to meet the interest on these bonds maturing in the coming January, and so it requested the holders to fund their coupons falling due January 1, 1874, July 1, 1874, and January 1, 1875, by converting them into new bonds payable on the 1st of

¹ *Acc. Fareira v. Keevil*, 18 Mo. 166. See *Chase v. Henry*, 166 Mass. 579. — **ED.**

January, 1877, and by so doing only, in legal effect, extend the time for the payment of the interest, without destroying the lien of the coupons under the mortgage, or otherwise affecting the obligation of the old bonds. Some of the bondholders funded their coupons, in accordance with this proposition, and accepted the extension bonds, but, under the arrangement, their coupons were not to be cancelled until the new bonds were paid.

In this condition of affairs the Parliament of Canada, on the 26th of May, 1874, enacted that the Canada Southern Railway, which was the railway built by the Canada Southern Railway Company under its provincial act of incorporation, "be declared to be a work for the general advantage of Canada," and a "body corporate and politic within the jurisdiction of Canada," for all the purposes mentioned in, and with all the franchises conferred by, the several incorporating acts of the legislature of the province. This, under the provisions of the British North America Act, 1867, passed by the Parliament of Great Britain "for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof," made the corporation a Dominion corporation, and subjected it to the legislative authority of the Parliament of Canada.

On the 15th of March, 1875, another series of bonds, amounting in the aggregate to \$2,044,000, or thereabouts, was issued and secured by a second mortgage to trustees. After the issue of all the bonds the company found itself unable to pay its interest and otherwise financially embarrassed, and a joint committee, composed of three directors and three bondholders, after full consideration of all the circumstances, submitted to the company and to the bondholders "a scheme of arrangement of the affairs of the company," which was approved at a meeting of the directors on the 28th of September, 1877. This scheme contemplated the issue of \$14,000,000 of thirty-year bonds, bearing three per cent interest for three years and five per cent thereafter, guaranteed, as to interest, for twenty years, by the New York Central and Hudson River Railroad Company, the first coupons being payable January 1, 1878. These new bonds were to be secured by a first mortgage on the property of the company, and exchanged for old bonds at certain specified rates. The old bonds of 1871 were to be exchanged for new at the rate of one dollar of principal of the old for one dollar of the new, nothing being given either for the past due coupons or the extension bonds executed under the arrangement in December, 1873. The proposed issue of bonds was large enough to take up all the old indebtedness at the rates proposed, whether bonded or otherwise, and leave a surplus, to be used for acquiring further equipment, and for such other purposes of the company as the directors might find necessary. This scheme was formally assented to by the holders of 108,132 shares of the capital stock out of 150,000; by the holders of the bonds of 1871 to the amount of \$7,332,000 out of \$8,703,000; and by the holders of \$1,590,000 of the second series of bonds out of \$2,029,000 then outstanding. Upon the representation

of these facts to the Parliament of Canada, the "Canada Southern Arrangement Act, 1878," was passed and assented to in the Queen's name on the 16th of April, 1878.

This statute, after reciting the scheme of arrangement, with the causes that led to it, and that it had been assented to by the holders of more than two-thirds of the shares of the capital stock of the company, and by the holders of more than three-fourths of the two classes of bonds, enacted that the scheme be authorized and approved; that the new bonds be a first charge "over all the undertaking, railway works, rolling stock, and other plant" of the company, and that the new bonds be used for the purposes contemplated by the arrangement, including the payment of the floating debt. Section 4 was as follows:

"4. The scheme, subject to the conditions and provisos in this act contained, shall be deemed to have been assented to by all the holders of the original first mortgage bonds of the company secured by the said recited indenture of the fifteenth day of December, one thousand eight hundred and seventy, and of all coupons and bonds for interest thereon, and also by all the holders of the second mortgage bonds of the company secured by the said recited indenture of the fifteenth day of March, one thousand eight hundred and seventy-five, and of all coupons thereon, and also by all the shareholders of the Canada Southern Railway Company, and the hereinbefore recited arrangement shall be binding upon all the said holders of the first and second mortgage bonds and coupons, and bonds for interest thereon respectively, and upon all the shareholders of the company."

Under the arrangement thus authorized the New York Central and Hudson River Railroad Company executed the proposed guaranty, and the scheme was otherwise carried into effect.

The several defendants in error were, and always had been, citizens of the State of New York, and were, at the time the scheme of arrangement was entered into and confirmed by the Parliament of Canada, the holders and owners of certain of the bonds of 1871, and of certain extension bonds, these last having been delivered to them respectively at the Union Trust Company in the city of New York, where the exchanges were made, in December, 1873. Neither of the defendants in error assented in fact to the scheme of arrangement, and they did not take part in the appointment of the joint committee. Their extension bonds have never been paid, neither have the coupons on their bonds of 1871, which fell due on the first of July, 1875, and since, though demanded. The company has been at all times ready and willing to issue and deliver to them the full number of new bonds, with the guaranty of the New York Central and Hudson River Railroad Company attached, that they would be entitled to receive under the scheme of arrangement.

These suits were brought on the extension bonds and past due coupons. The company pleaded the scheme of arrangement as a defence, and at the trial tendered the new bonds in exchange for the

old. The Circuit Court decided that the arrangement was not a bar to the actions, and gave judgments in each of them against the company for the full amount of extension bonds and coupons sued for. To reverse these judgments the present writs of error were brought.

WAITE, C. J.¹ That the laws of a country have no extraterritorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country. The obligor of the bonds and coupons here sued on was a corporation created for a public purpose, that is to say, to build, maintain, and work a railway in Canada. It had its corporate home in Canada, and was subject to the exclusive legislative authority of the Dominion Parliament. It had no power to borrow money or incur debts except for completing, maintaining, and working its railway. The bonds taken by the defendants in error showed on their face that they were part of a series amounting in the aggregate to a very large sum of money, and that they were secured by a trust mortgage on the railway of the company, its lands, tolls, revenues, etc. In this way the defendants in error, when they bought their bonds, were, in legal effect, informed that they were entering into contract relations not only with a foreign corporation created for a public purpose, and carrying on its business within a foreign jurisdiction, but with the holders of other bonds of the same series, who were relying equally with themselves for their ultimate security on a mortgage of property devoted to a public use, situated entirely within the territory of a foreign government.

A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty" (*Bank of Augusta v. Earle*, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. *Railroad v. Koontz*, 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf v. Rundel*, 103 U. S. 226), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul v. Virginia*, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and

¹ Part of the opinion is omitted. — ED.

purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

No better illustration of the propriety of this rule can be found than in the facts of the present case. This corporation was created in Canada to build and work a railway in that Dominion. Its principal business was to be done in Canada, and the bulk of its corporate property was permanently fixed there. All its powers to contract were derived from the Canadian government, and all the contracts it could make were such as related directly or indirectly to its business in Canada. That business affected the public interests, and the keeping of the railway open for traffic was of the utmost importance to the people of the Dominion. The corporation had become financially embarrassed, and was, and had been for a long time, unable to meet its engagements in the ordinary way as they matured. There was an urgent necessity that something be done for the settlement of its affairs. In this the public, the creditors, and shareholders were all interested. A large majority of the creditors and shareholders had agreed on a plan of adjustment which would enable the company to go on with its business, and thus accommodate the public, and to protect the creditors to the full extent of the available value of its corporate property. The Dominion Parliament had the legislative power to legalize the plan of adjustment as it had been agreed on by the majority of those interested, and to bind the resident minority creditors by its terms. This power was known and recognized throughout the Dominion when the corporation was created, and when all its bonds were executed and put on the market and sold. It is in accordance with and part of the policy of the English and Canadian governments in dealing with embarrassed and insolvent railway companies and in providing for their reorganization in the interest of all concerned. It takes the place in England and Canada of foreclosure sales in the United States, which in general accomplish substantially the same result with more expense and greater delay; for it rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect, and a reorganization of the affairs of the corporation under a new name brought about. It is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who

are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting States from passing laws impairing the obligation of contracts, allows Congress "to establish . . . uniform laws on the subject of bankruptcy throughout the United States." Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries. The fact that the bonds made in Canada were payable in New York is unimportant, except in determining by what law the parties intended their contract should be governed; and every citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations.

On the whole, we are satisfied that the scheme of arrangement bound the defendants in error, and that these actions cannot be maintained.

HARLAN and FIELD, JJ., dissented.

*It made in M. H. perform
in La. Breach in La. B.
It to rescind.
Held: Presumption of*

MORGAN v. NEW ORLEANS, MOBILE, AND TEXAS
RAILROAD.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF LOUISIANA. 1876.

[Reported 2 Woods, 244.]

BILL to obtain the rescission of a certain contract made between the plaintiff and the defendant railroad. Morgan and the railroad company owned various transportation lines and charters for building railroads between Mobile, New Orleans, and Houston. To compose their differences they made an agreement by which Morgan agreed to convey to the corporation his transportation line (steamers, wharves, and railroads) between Mobile and New Orleans, and his rights in a partly constructed railroad in Louisiana, and to subscribe a certain amount toward the stock of the railroad company. The company agreed to convey to Morgan a line of railroad in New Orleans, and to complete the unfinished line of railroad conveyed to it by Morgan within a certain time. Arrangements were also made for a division of the receipts between the parties.

This agreement was made and executed in New York, and in accordance with its terms the conveyances of transportation lines were made, and Morgan paid in the amount of his subscription to the stock of the railroad company. The defendant corporation did not complete the construction of the Louisiana railroad within the agreed time.

The prayer for rescission was based upon Articles 2045, 2046 of the Civil Code of Louisiana: "The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed;" and such "resolutive condition is implied in all commutative contracts, to take effect in case either of the parties does not comply with his engagements."¹

BRADLEY, Circuit Justice. . . . The next question is, whether the complainant is entitled to have the contract rescinded on account of nonperformance by the railroad company of their part of it. The demand for rescission on this ground rests upon the peculiar law of the State of Louisiana before referred to. If the contract is to be governed by that law, I should have no hesitation in saying that the complainant is entitled to the relief which he asks. The building of the railroad beyond Brashear City, so as to give the complainant a through connection between his Opelousas road and Texas, was undoubtedly a material consideration with him, amongst the other considerations moving to the contract. The contract was a commutative one. In that respect it fully met the definition of the Louisiana Code, which declares (art. 1768): "Commutative contracts are those in which what is done, given, or promised by one party is considered as equivalent to, or a consideration for, what is done, given, or promised by the other."

It becomes material, therefore, to ascertain whether the contract is to be governed by the law of Louisiana. The general rule is, that a contract is to be governed as to its interpretation, its nature, its obligation, and its performance, or dissolution, by the law of the place where it is made or entered into. In other words, *lex loci contractus est lex contractus*. The first and principal exception to this rule is, that if the contract is made in one State or sovereignty, and is to be performed in another State or sovereignty, it is to be governed by the law of the place of performance, because it will be presumed that the parties had the laws of the latter place in view when they entered into the contract. The rule and the exception have been fully discussed and commented upon by Mr. Justice Story in his Conflict of Laws, and by many other writers on private international law, and it is unnecessary to review those discussions here.

In this case the contract was made in New York by persons who resided there. The railroad company, it is true, was a corporation originally chartered by Alabama, and subsequently capacitated by the laws of Louisiana and Texas to exercise all its faculties in those States; but its directors and officers mostly resided in New York and other Northern States, and its principal office was in New York, and the meetings of its directors were usually held there. In this case, all the negotiations which led to the contract were carried on in New York, and the contract itself was concluded and executed there.

¹ This short statement of facts is substituted for that contained in the opinion. Part only of the opinion is given.—ED.

But, on the other hand, the interests, operations, and property, which formed the principal object of the contract, were located in the Southern States bordering on the Gulf of Mexico, to wit: Alabama, Mississippi, Louisiana, and Texas, and largely in the State of Louisiana. The contract was made with reference to these interests, operations, and property; but its direct object, that is, the things stipulated and agreed to be done and performed, were to be, or might be in part, done and performed in New York as well as in the States referred to. This will appear when we look at the contract a little more particularly.

It is altogether a personal contract, providing for the doing of certain acts on the one side, and on the other. Its object was a settlement of controversies, and a discontinuance of business opposition between the parties. It is evident that many of the acts stipulated to be done could be, and, in fact, were done in the city of New York. There Morgan executed and delivered to the company the various deeds and transfers of property which he had agreed to do; the conveyances of the property in Mobile, the bills of sale of the steamers, the transfer of Pontchartrain Railroad Company stock, the conveyance of the railroad rights north and west of Brashear City. There he made his stipulated subscription to the securities of the railroad company. There the company delivered to him the said securities, namely, the bonds and certificates of stock. But the discontinuance of the steamboat business between Mobile and New Orleans, and the delivery of the property consequent upon the said conveyances, were done in Alabama and Louisiana; and the building and completion of the railroad beyond Brashear City were necessarily to be done in the latter State.

Now, by what law is such a contract to be governed, where it is executed in one State, and is partially to be performed in that State, and partially in other States?

I have no difficulty in saying that the conveyances and transfers to be made in pursuance of the contract were to be made in conformity with the laws of the States respectively in which the property, when consisting of realty, or subject to local law, was situated. And such conveyances and transfers, when executed, would be governed by the *lex rei sitæ*. But that does not answer the question as to what law the principal contract is to be governed by. In Louisiana, nonperformance of a material stipulation renders the whole contract liable to be dissolved. But no one would apply that rule of Louisiana law to a contract not subject to its dominion, even though the breach should occur in Louisiana. The fact, therefore, that one of the acts to be performed in this case — the construction of the railroad — was to be performed in Louisiana, will not help to resolve the question, unless we can affirm that the entire contract is to be governed by Louisiana law. Does the fact, that a portion of the contract must necessarily be performed in Louisiana, subject it to that condition? If that does, then the like fact that a portion of the contract is necessarily to be performed in Alabama would subject it to Alabama law, and make it an Alabama contract.

In this embarrassment, I do not know that I can do better than to fall back on the general rule that a contract is to be governed by the law of the place where it is made. The presumption, that where a contract is to be performed in a different jurisdiction, the parties must be intended to have in view the laws of the latter, seems to be repelled when the performance is to take place in several different jurisdictions. For when there are two equal and opposite presumptions, neither of them can prevail. The present case is still stronger; for much of the contract was performable, and actually performed in the place where it was made.

I do not mean to say that where the main and principal part of a contract is to be performed in a State different from that in which it is made, the presumption will not arise that it is made in reference to the laws of such place of performance, even though some minor and incidental parts are required to be performed in still different States. Such may, very possibly, be the result in many instances that may occur. When they happen they will be governed by the force of their own circumstances. But I do not see that I am called upon to apply any such exceptional rule in this case. The building of the railroad in question was a very important consideration, it is true; but the contract embraced many other considerations equally important, that were not necessarily to be performed in Louisiana.

The conclusion, therefore, to which I am forced to come is, that the principal contract, made on the 12th of December, 1871, between the complainant and the New Orleans, Mobile, and Texas Railroad Company, was a New York contract, governed, as to its nature and obligation, by the laws and jurisprudence of the State of New York; and as by these laws and jurisprudence, so far as appears, no such dissolving consequence follows from a nonperformance of part of the contract, as is claimed in this case, the claim is untenable, and the relief must be refused.

As no relief can be granted on either of the grounds laid in the bill of complaint, the same must be dismissed with costs.

*located debt in Pa. to N.
it holds. X, sued on judg.
we, N. saving rights against
Pa. law. A. J. Greenwald v. Kaster.
in reference.
age.*

GREENWALD v. KASTER.

SUPREME COURT OF PENNSYLVANIA. 1878.

[Reported 86 Pennsylvania, 45.]

TRUNKEY, J.¹ Lazarus H. Kaster and Joseph Eckhouse, late partners, doing business in the State of Indiana, contracted a debt for goods, purchased of F. Greenwald & Co., in Philadelphia. In the action brought for recovery of that debt, judgment was taken against Kaster for want of appearance. The summons was returned *nihil*

¹ Part of the opinion only is given. — ED.

habet as to Eckhouse. Afterwards suit was brought against Eckhouse in Indiana. The plaintiffs, by their attorneys in fact, on the 4th February, 1875, in consideration of \$700 paid by Eckhouse, released all rights of action against him, and surrendered all claims on account of indebtedness of him, or of the firm of Kaster & Eckhouse, reserving all rights, claims, and liens against said Kaster by reason of their judgment against him in the District Court of Philadelphia, for the sum of \$4,547.98. Upon Kaster's application an issue was ordered to determine the question whether that release operated as a satisfaction of the judgment. At the trial of the issue the learned judge instructed the jury to find for the defendant, for the reason that a release to Joseph Eckhouse, the defendant's partner, executed in Indiana, is a release of both. This direction is assigned for error, and is the only assignment that requires consideration. . . .

The debt was contracted and judgment thereon obtained in Pennsylvania. By the law of this State the plaintiffs could compromise with and discharge Eckhouse from his proportion of the debt, which would be deemed as payment to them of such proportion, without prejudice to their right to recover the other portion from Kaster, and without prejudice to his right for contribution against Eckhouse. As to the extent of contribution, on settlement between Kaster and Eckhouse, we say nothing. No act has been done to defeat the right. The judgment fixed Kaster for the whole indebtedness. The plaintiffs are considered as having received half of it from his former partner, and, in equity, have no claim for more than half the judgment. When Kaster comes and demands discharge from the whole, upon averment that he himself has paid no part of it, but that, for a small sum, they released Eckhouse, expressly reserving their rights against him on the judgment, he makes an unconscionable claim, which should not be granted, except in obedience to positive law. No law requires courts to open their judgments to such end. Had the plaintiffs entered credit for a moiety of the judgment, there would have been no reason for an issue.

The jury should have been instructed to find for the plaintiffs, for one half the amount of the judgment.

Judgment reversed, and venire de novo awarded.

TENANT v. TENANT.^u

SUPREME COURT OF PENNSYLVANIA.

[Reported 110 Pennsylvania, 478.]

GREEN, J.¹ The contract in suit in this case was in form a promissory note under seal for the payment of \$130.52, dated October 26,

¹ Part of the opinion only is given. — ED.

1869, payable at nine months from date. No place of payment is designated in the instrument, but it was given to A. W. Tenant, administrator, etc., of William Tenant, deceased, who was a resident of West Virginia at the time of his death, and the administrator was and is, also, a resident of the same State. The note was given in payment of certain articles purchased at administrator's sale held in West Virginia soon after the intestate's death, and was delivered to the payee in that State. Two sureties joined in the note, one of whom lived in West Virginia and the other in Pennsylvania, and it is against these the present suit is brought. Of course, the note being payable at the residence of the payee and having been delivered there, for goods sold there, must be deemed and taken to be a West Virginia contract. This contract was made, and was to be performed, in that State, and hence the law of that State must govern in determining its validity, obligation, and construction. The only question in the case is, whether the defence set up by the sureties must be determined by the law of West Virginia or the law of Pennsylvania. The defence is that the sureties gave notice to the creditor that he must proceed against the principal for the collection of the note or they would no longer be responsible. By the law of West Virginia such a notice, to be effective, must be in writing. In this case it was verbal only, and therefore if judged by the law of West Virginia it was nugatory. It is argued for the defendants that this right of relief to a surety is a matter relating to the remedy and must therefore be determined by the *lex fori*. But we do not think this position tenable. The right of a surety to discharge his obligation by notice to the creditor to pursue the debtor is an incident of the contract of suretyship. It is a part of the law of that contract, and is therefore a part of the contract itself. It is a qualification of the obligation of the contract, reducing it from a peremptory and absolute obligation to one of a qualified or conditional character. It is true the surety may not exercise his right, and if he does not his obligation remains intact. But on the other hand he may exercise it, and if he does, and the creditor pays no heed to the notice and thereby fails to recover from the principal debtor, the very root of the surety's obligation is reached and destroyed; he is no longer liable; it is as though he had never contracted. Very different is this from the defence of the Statute of Limitations. There the obligation of the contract is not terminated or defeated. Only a right to enforce it by an action in the courts is imperilled. The State simply declares that if her process is used it must be done within certain fixed periods of time, and if not so used the defendant may at his option plead the laches of the plaintiff and receive the benefit of the prohibition. It is in substance a prohibition upon the use of process after a defined period, and this, of course, makes it matter of remedy only. For these reasons we think it quite clear that the right of a surety to discharge his obligation by a disregarded notice to the creditor to pursue the principal debtor, is a matter affecting the obligation of the contract,

and must therefore be determined by the law of the place of the contract. The notice given in this case was verbal only, and therefore of no effect by the law of West Virginia and hence unavailing here.¹ . . .

FEAR v. BARTLETT.

COURT OF APPEALS OF MARYLAND. 1895.⁴

[*Reported 81 Maryland, 435.*]

ROBINSON, C. J.² The plaintiff is the trustee of the Valley Land and Improvement Company, chartered by the State of Virginia, and this is a suit to enforce the payment of the defendant's subscription to the capital stock of the company. The defence is that the defendant was induced to become a subscriber on the faith of certain representations set forth in a prospectus issued by the company; that these representations were false and fraudulent, and that the defendant, as soon as he became or could by reasonable diligence become aware of the fraud, and before the insolvency of the company, repudiated his contract of subscription and so notified the company. . . .

If one is induced to become a subscriber to its capital stock by the fraud of the company and within a reasonable time after the discovery of the fraud, there being no laches on his part in discovering the fraud, repudiates his subscription, and this too before the insolvency of the company, under such circumstances he is, according to the settled law of this country, relieved of all liability on account of his subscription. He is relieved because he has the right to avoid a fraudulent contract, and because he has exercised this right. The subsequent insolvency of the company can upon no principle make him liable on a fraudulent contract which he has thus repudiated. . . .

In dealing with the defendant's subscription, we have treated it as a Virginia contract. The company was chartered by that State, with its office and place of business in that State, and although the subscription was made in this State, the contract was to be performed in Virginia. And this being so, the rights and liabilities of the parties under it are to be determined by the law of that State. And what we have said as to the right of the defendant to repudiate his subscription on the ground that it was procured through the fraud of the company, is strictly in accord with decision of the Court of Appeals of that State in Weisiger and others v. Richmond Ice Machine Company, 90 Va. 795.

Judgment reversed and new trial awarded.

¹ See *Howard v. Fletcher*, 59 N. H. 151. — ED.

² Part of the opinion only is given. — ED.

Mont., payable in N.Y.
 n-payment of premiums causes
 forfeiture only if notice is given.
 Law MUTUAL LIFE INSURANCE COMPANY OF NEW
 York v. COHEN.

intended SUPREME COURT OF THE UNITED STATES. 1900.

has been made. [Reported 179 United States, 262.]

BREWER, J.¹ . . . The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the State of Montana. Under those circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that State. *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 232. In that State, there being no statutory provisions to the contrary, the failure to pay the annual premium worked, in accord with the terms of the policy, a forfeiture of all claims against the company.

New York, on the other hand, the State by which the insurance company was chartered and in which it had its principal office, by section 1 of chapter 321 of 1877 had enacted:—

“SECT. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided.”

The provision referred to and which is stated at length in the succeeding part of the section is one for notice of a special kind and to be given in a particular way. The section is quoted in full in 178 U. S. 330.

This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover.

The question, therefore, is whether the law of New York controls.

The presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof. The New York statute does not purport to change any insurance company charter. On the contrary, its obvious purpose is only to reach business transacted within the State. Proceeding on the accepted principle that a State may determine the conditions, the meaning, and limitations of contracts executed within its borders, the language of the statute reaches contracts made within the State. Undoubtedly a foreign insurance company making a contract within the State of New York would find that contract burdened by its provisions, and equally clear is it that such company making a contract in another State would be free from its limitations. There is no indication of an intent on the part of the

¹ Part of the opinion only is given. — Ed.

legislature of New York to affect, even if it were possible, the general powers of a foreign company coming within the State and transacting business. But on the face of the statute there is no express demarcation between foreign and local companies. There is no attempt to say that a foreign company doing business within the State shall, as to such business, be subject to the prescribed limitations, and that a home company doing business within the State and elsewhere shall as to all its business be so limited. If we cannot from the language impute to the legislature an intent to regulate the business of a foreign company outside of the State, how can we find in such language an intent to prescribe limitations upon the contracts of a home company outside the State? In the absence of an expressed intent it ought not to be presumed that New York intended by this legislation to affect the right of other States to control insurance contracts made within their limits. Can it be that the State of New York, aware of the fact that other States and other countries might by their legislation properly prescribe terms and conditions of insurance contracts, meant by this legislation to restrict its local companies from going into those States and countries and transacting business in compliance with their statutes if in any respect they were found to conflict with the regulations prescribed for business transacted at home?

Again, it is worthy of notice that the State of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of notice. See Laws, 1876, chap. 341, § 1; the statute now under consideration, Laws, 1877; Laws, 1892, chap. 690, § 92; Laws, 1897, chap. 218, § 92. The varying provisions of these statutes, directed in terms, not to local companies but to companies doing business in the State of New York, strengthen the conclusion that the State was not thus changing the several charters of its companies, but prescribing only that which in its judgment from time to time was the proper rule for business transacted within the State.

Again, the terms of the act itself tend in the same direction. It provides for a 30-day notice. While such a notice might be reasonable as to all policies within the State, yet when it is remembered that some at least of the New York insurance companies are doing business in all quarters of the globe, it is obvious that a 30-day notice in many cases would be of little value.

Further, by section 2 the statute provides that an affidavit by one authorized to mail the notice shall be "presumptive evidence" of the giving of the notice. Can it be supposed that the legislature of New York was contemplating a rule of evidence to be enforced in every State and nation of the world?

These considerations lead to the conclusion that the statute of New York, directed as it is to companies doing business within the State, was intended to be, and is, in fact, applicable only to business transacted within that State.

It is not doubted that a contract by an insurance company of New

York executed elsewhere may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer. And it is urged that, although there is nothing in the policy to indicate this, the language of the application has that effect. It recites that it is "subject to the charter of such company and the laws of said State;" and the contract refers to the application, and declares that it is issued "in consideration of the application for this policy and of the truth of the several statements made therein." While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured; and a stipulation that it shall be controlled by the charter and the laws of the State is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. That such language was incorporated into the application is not strange. Its meaning is clear, and is that no local statute as to the effect of statements or representations or any other matter in the application should in these respects override the provisions of the charter and the laws of New York. In other words, if by the charter or the laws of New York any statement in an application is to be taken as a warranty, no local statute declaring that all statements in an application are to be taken as simply representations shall override the terms of the charter and the New York law. But that is very different from a provision that the contract issued upon such application should also be in all its respects controlled by the laws of New York. . . .

We conclude, therefore, that the statute of the State of New York does not under the circumstances presented control, and that the rights of the parties are measured alone by the terms of the contract. The insured having failed to pay the premium for years before his death, the policy was forfeited.

McKENNA, J., dissented.

SECTION IX.

SPECIAL FORMS OF OBLIGATION.

(4) MERCANTILE INSTRUMENTS.

ORY v. WINTER.

SUPREME COURT OF LOUISIANA. 1826.

[Reported 4 Martin, New Series, 277.]

PORTER, J.,¹ delivered the opinion of the court. This case was heard last June, and judgment pronounced at that term. Doubting the correctness of our former judgment, we granted a rehearing, and the case has been argued again, and has received all the elucidation of which we believe it is susceptible.

The action was instituted on a promissory note made at Natchez, payable to one Lloyd Gilbert, and by him indorsed to the plaintiff and appellee.

It is shown by a statute of the State of Mississippi, that the maker of a note, in that State, may set up any equitable defence against a *bona fide* indorsee which he could offer against the payee. Laws of Mississippi, 464.

The first question in the cause is, by what laws should this contract be governed? The plaintiff contends, that as the note was indorsed in this State, and to a citizen of it, that the rights of the parties must be ascertained by the laws of Louisiana.

We are clearly of opinion it should not. That the validity of a contract must be ascertained in relation to the laws of the country where it is made, is a rule as well known, and of as frequent application in this court, as any other we act under. We see nothing in the circumstance of the rights of one of the parties being transferred to the citizen of another State which can take the case out of the general principle. The argument which attempts to do so takes for granted the note was negotiable, in our understanding of the term, though the very object of the statute was to take from it that character. This is not the case of a citizen of one State claiming rights in opposition to those set up by a third party, under a contract made in pursuance to the laws of another country. It is a demand made under an agreement entered into in a foreign State, and consequently the party claiming rights under it must take it with all the limitations to which it was subject in the place where it was made, and that although he be one of our citizens.²

¹ Part of the opinion is omitted. — Ed.

² All questions as to the validity and the nature of a mercantile obligation are to be determined by the law of the place where the obligation came into being. Thus

LEBEL *v.* TUCKER.

QUEEN'S BENCH. 1867.

[*Reported Law Reports, 3 Queen's Bench, 77.*]

LUSH, J.¹ The action is on a bill drawn, accepted, and payable in England, and which is therefore an inland bill; and the action is brought by persons claiming the right to sue by title derived from the drawers and payees according to the English law. The defence is, that the indorsement was made in France, and is not conformable to the law of France, which requires that the indorsement should bear a date, and express the consideration for the indorsement and the name of the indorsee. The question is, is that any answer to an action against the acceptor of an English bill? The circumstances are somewhat novel, but the principle applicable is not novel; it existed before, and is well established by the decision in *Trimbey v. Vignier*, 1 Bing.

capacity is governed by the law of the place of entering into the obligation. *Benton v. Bank*, 45 Neb. 850, 64 N. W. 227; 14 Clunet, 638 (Germany, 16 Oct. '85). See, however, 4 Clunet, 71 (Austria, 23 Dec. '75), domicile of the party to be bound; 26 Clunet, 177 (Austria, 27 April, '98), capacity of acceptor by place of drawing.

Whether sufficient consideration has passed is to be governed by the law of the place of obligation: as against the drawer, by the place of drawing: *Wood v. Gibbs*, 35 Miss. 559; as against the acceptor, by the place of acceptance: *Webster v. Howe Machine Co.*, 54 Conn. 394, 8 Atl. 482; *Fasic. Belge*, '93, 2, 39 (Liège, 16 July, '92); as against the indorser, by the place of indorsement: *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103; *Staples v. Nott*, 129 N. Y. 403.

The form of the obligation is governed by the law of the place of making; as whether commercial paper must be expressed as for "value received." *Stix v. Matthews*, 63 Mo. 371; *Sirey*, '57, 1, 586 (Fr. Cass. 18 Aug. '56). But see *Emanuel v. White*, 34 Miss. 56 (by law of place of payment). So whether the addition of a clause giving attorneys' fees deprives a bill of its negotiable character depends on the law of the place of making. *Howenstein v. Barnes*, 5 Dill. 482.

The nature of the liability created is governed by the law of the place of creating the obligation. Thus whether an "anomalous indorser" is a joint maker is determined by the law of the place of indorsement. *Phipps v. Harding*, 70 Fed. 468. Whether an indorser is liable personally to the indorsee is determined by the law of the place of indorsement. *Hyatt v. Bank*, 8 Bush, 193; *Nichols v. Porter*, 2 W. Va. 13; 16 Clunet, 735 (Cass. Florence, 16 Jan. '88). Whether an acceptor is liable to the drawer is determined by the law of the place of acceptance, 24 Clunet, 387 (Colmar, 11 Jan. '95). Whether a note is negotiable, so that payment to the payee or his creditor before notice of indorsement would not discharge the maker, is determined by the law of the place of making. *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775; *Warren v. Copelin*, 4 Met. 594; *Dow v. Rowell*, 12 N. H. 49. It has, however, been intimated that this question is governed by the law of the place of payment. *Brabston v. Gibson*, 9 How. 263 (*semble*); *Strawberry Point Bk. v. Lee*, 117 Mich. 122, 75 N. W. 444 (*semble*). And see *Savings Bank v. Nat. Bank*, 38 Fed. 800; *Bank v. Hemingray*, 31 Oh. S. 168.

It has been held that whether an indorsement for a pre-existing debt bars equities, as a purchase for value, is to be determined by the law of the place of indorsement. *King v. Doolittle*, 1 Head 77. — ED.

¹ The concurring opinion of MELLOR, J., is omitted. — ED.

N. C. 151, viz., that contracts must be governed by the law of the country where they are made. Now, the contract on which the present defendant, the acceptor, is sued, was made in England. The contract which the drawer proposes is this: he says, "Pay a certain sum at a certain date to my order;" the acceptor makes this contract his own by putting his name as acceptor, and his contract, if expanded in words, is, "I undertake at the maturity of the bill to pay to the person who shall be the holder under an indorsement from you, the payee, made according to the law merchant." How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England? The bill retains its original character; it remains an inland bill up to the time of its maturity, and is negotiable according to English law; and by the English law a simple indorsement in blank transfers the right to sue to the holder. This principle is pointedly applied by the judgment in *Trimbey v. Vignier*, 1 Bing. N. C. 151. My Brother *Hayes* is mistaken in supposing that the judgment deals *simpliciter* with the place of the indorsement, without reference to the fact of the instrument itself being a French note; on the contrary, that fact lies at the very bottom of the decision. Thus, at the very commencement of the judgment *TINDAL*, C. J., after saying that the point reserved was, whether the plaintiff, under the circumstances stated in the case, was entitled to maintain the action in an English court of law in his own name, proceeds: "The promissory note was made by the defendant in France; and it was indorsed in blank by the payee in that country; each of the parties, the maker and the payee, being at the respective times of making and indorsing the note domiciled in that country. The first inquiry, therefore, is, whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France." He then discusses what is the law of France, and comes to the conclusion that the plaintiff, the indorsee, could not have sued the maker in his own name in the courts of France, and proceeds: "The question, therefore, becomes this: Supposing such rule to prevail in the French courts, by the law of that country, is the same rule to be adopted by the English courts of law, when the action is brought here, the law of England, applicable to the case of a note indorsed in blank in England, allowing the action to be brought in the name of the holder? The rule which applies to the case of contracts, made in one country and put in suit in the courts of law of another country, appears to be this: that the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractus*), the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought." He then cites authorities for this position, and concludes: "The question, therefore, is, whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only

relates to the mode of instituting and conducting the suit. . . . And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. . . . If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. . . . We think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here." The judgment, therefore, proceeds on the ground that the contract, that is, the contract of the maker of the note, having been made in France, it must be governed by the law of France. So here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted. The original contract cannot be varied by the law of any foreign country through which the instrument passes. Therefore, as it seems clear to me, the plaintiffs are entitled to judgment. It is not necessary to consider what would be the effect of this indorsement as against the indorser, if sued in France; probably, the courts of France would hold that the English law governed. All we decide is, that the acceptor having contracted in England to pay in England, the contract must be interpreted and governed by the law of England, and that the plaintiffs have acquired a right to sue.

Judgment for the plaintiffs.¹

ALCOCK v. SMITH.

COURT OF APPEAL. 1892.

[Reported [1892] 1 *Chancery*, 238.]

LINDLEY, L. J.² The question in this case is which of two persons is entitled to a sum of £350, being the produce of a certain cheque for £235 and a bill of exchange for £115. It will not be necessary to draw any distinction between the cheque and the bill, and, therefore, I will allude only to the bill.

¹ See *Bradlaugh v. De Rin*, L. R. 5 C. P. 473.

The sufficiency of an indorsement to pass title to a mercantile instrument is to be determined by the law of the place of indorsement. *Brook v. Vannest*, 58 N. J. L. 162, 33 Atl. 382; *Woods v. Ridley*, 11 Humph. 194; 5 Clunet, 51 (Palermo, 7 July, '77); 12 Clunet, 79 (Paris, 8 Dec. '81); 21 Clunet, 586; (Liège, 26 July, '93). *Contra* (by the law of the place of payment), *Everett v. Vendryes*, 19 N. Y. 436; 20 Clunet, 194 (Germ. 5 Nov. '89). — Ed.

² Concurring opinions of LOPES and KAY, LJJ., are omitted. — Ed.

The bill was drawn in the English language in England by an Englishman named Ellison on Messrs. Smith, Payne, & Smith, of London, bankers, and was made payable in London. It was drawn to the order of Messrs. Andresen & Co., who were merchants in Christiania, in Norway. The history of the bill is this: It was indorsed by Messrs. Andresen to a Mr. Meyer, and it was on the 11th of March indorsed by Mr. Meyer in blank, and was given by him to a gentleman of the name of Schiender for Arthur Alcock and the firm of J. F. Alcock & Co., which last firm consisted of John Forster Alcock and Arthur Alcock. It is important to bear in mind that it was a bill which, as it then stood with Meyer's indorsement upon it, was a negotiable instrument transferable to bearer. The Alcocks then held it by their agent Schiender. In that state of things, under a judgment obtained in Norway against Mr. John Forster Alcock, one of the judicial officers or ministerial officers in Norway (a person whom I will allude to for the sake of shortness as a sheriff) seized in execution, according to the law of Norway, this bill indorsed as it was, and sold it in accordance with the law of Norway. It was bought by a person of the name of Schjöldt for Meyer, and, on the 9th of May, Meyer sold it to Köpmansbank. It did not require any further indorsement, because it was sold as a negotiable instrument payable to bearer, and was bought by Köpmansbank as a negotiable instrument payable to bearer; and they bought it in the ordinary course of business *bonâ fide* and for value. At that time the bill was unquestionably overdue. One point which we have to consider is, what was the effect of the purchase by Köpmansbank of this bill in its then state and under the circumstances I have mentioned, bearing in mind that it was an overdue bill of exchange? Now, according to Mr. Schiender's evidence, which is not contradicted or disputed, it is plain that, under the law of Norway, the judicial sale of that negotiable instrument "transferable to bearer" (a circumstance to which I attach great importance) conferred a good title upon the purchaser. It is also proved by the other evidence that, according to the law of Norway, a person who *bonâ fide* purchases for value a bill of exchange, which bill is overdue, is not affected in regard to title as he would be affected by the law of England.

That being the state of things, and Köpmansbank having become the holders of that bill for value, I proceed to consider whether they are or are not entitled to recover and hold for themselves the money represented by the bill. It has been argued by Mr. Haldane and Mr. Farwell, that inasmuch as this was an inland bill transferred to them when it was overdue, although it was taken *bonâ fide*, they took it subject to all equities affecting the bill, and they say that Köpmansbank could not maintain an action in respect of that bill against the acceptor of it. That argument is based upon the fact that this was an English bill, and upon the combined operation of the Bills of Exchange Act, sect. 72, sub-sect. 2, which I will read presently, sect. 36, sub-sect. 2, and sect. 29, sub-sect. 2. Now, it is impossible in applying those sec-

tions to this bill and to the title of Köpmansbank to ignore the fact that they acquired their title under the judicial sale, and if due effect is given to that, then it seems to me that, even looking at the matter in the narrowest possible point of view, Köpmansbank are entitled to recover this money from the acceptor.

Now, I will go through the sections with reference to the arguments which have been addressed to us. Sect. 72 of the Bills of Exchange Act relates to the conflict of laws, and the first part of it does not apply, but sub-sect. 2 runs thus: "Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill" — as this is — "is indorsed in a foreign country" — as this was — "the indorsement shall as regards the payer" — which I read as the acceptor — "be interpreted according to the law of the United Kingdom." Now, this bill was indorsed in such a way, as it appears to me, that the indorsement was effectual whether you interpret according to English law or according to any other law. Then sect. 36, sub-sect. 2, is important, because, treating this as an English bill covered by English law, it is applicable. Sub-sect. 2 says this: "Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had." That is to say, if you take an overdue bill you take it subject to any defect of title in the person from whom you got it. That gives rise to the question, Was there any defect in title in Meyer, from whom Köpmansbank got it? That must be considered. But Meyer got it under the judicial sale, and there was no defect at all. Now, "defect of title" is a phrase introduced into the Bills of Exchange Act in lieu of the old expression "subject to equities," which is an expression not adopted because the Act applies to Scotland as well as to England, and "subject to equities" is an expression not known to Scotch law. Sect. 29, sub-sect. 2, says "In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." The present case clearly does not come within those words. The only possible words under which it could come would be "or other unlawful means." But the means by which Meyer got the bill were not unlawful; they were lawful according to the law of the place where the transaction took place. Therefore, putting the case in the light most favorable to the appellants, Köpmansbank have a good title to this bill and the money represented by it, treating it as an English bill and applying the provisions of the Bills of Exchange Act, having regard, of course, to what took place in Norway.

Now, if that is so, we have only further to consider whether there are any equitable grounds for depriving those gentlemen of the money to which they have become entitled. The appellants put their case very forcibly in this way, that the judicial sale of the bill was subject to the claim of Arthur Alcock to eight-elevenths of this money; but how can that equity attach to a bill indorsed in blank, and so transferable to bearer? That may be a question between themselves, but it does not affect any person taking the bill. The bill is taken simply with notice that the sheriff, as I have called him, was selling. Now, what did the sheriff sell? He did not sell the bit of paper merely, but he sold the bill—that is to say, he sold the benefit of the contract represented by the paper which he handed over. What was that benefit, and what was the contract? The contract on the part of the acceptor was to pay the bill to the lawful holder. That is said to mean, the lawful holder according to the law of England. I agree. But we must not ignore what took place in Norway. The argument on the part of the appellants is that we ought to shut our eyes to the mode and circumstances under which Meyer got the bill. If the mode and circumstances under which he got it were such as to give him a title in Norway, not only to the bill but to the benefit of the contract, then Köpmansbank are the lawful holders by the law of England, and there would be no defence to an action. The equity is displaced by the very same reasoning. You cannot enforce the equity as against the *bonâ fide* holder of a bill which is transferable to bearer, and of which he is the lawful holder.

With reference to the authorities, I do not think I need say much. The strength of the plaintiffs' case is that this was an overdue bill with notice of the defect in title. The answer is that there is no defect of title, and therefore there is nothing for the holders to have notice of. The cases of *Lebel v. Tucker*, Law. Rep. 3 Q. B. 77; *Lee v. Abdy*, 17 Q. B. D. 309; and *Bradlaugh v. De Rin*, Law Rep. 3 C. P. 538; *Ibid.* 5 C. P. 473, do not appear to me to touch this case at all. We are asked to say on the authority of those cases that the court is to ignore a title which is good according to the law of the country where the bill has been sold. Those cases lay down no such principle. The difficulty of the appellants in this case arises from the fact that Alcocks, though they had been the lawful holders of the bill, had ceased to be so by the law of Norway. *Lebel v. Tucker*, Law. Rep. 3 Q. B. 77, does not touch that, nor do any of the cases which have been referred to come near it.

On those short grounds, treating this to the fullest extent as a bill overdue when bought, and assuming that Köpmansbank are supposed to have had notice of any defect of title, the fact that there was no defect of title is a complete answer both at law and in equity. Therefore, I am of opinion that the learned judge in the court below in this case was quite right, and that this appeal must be dismissed with costs.

AYMAR *v.* SHELDON.

SUPREME COURT, NEW YORK. 1834.

[Reported 12 *Wendell*, 439.]

ERROR from the Superior Court of the city of New York. Sheldon and others, as indorsees, brought a suit against B. & I. Q. Aymar, as indorsers of a bill of exchange, bearing date 4th June, 1830, drawn by V. Cassaigne & Co. St. Pierre, at Martinique, on L'Hôtelier Frères, at Bordeaux, in France, for 4,000 francs, payable at twenty-four days' sight, to the order of B. Aymar & Co., the name of the firm of B. & I. Q. Aymar. The plaintiffs set forth the indorsement of the bill of exchange at the city of New York, where, they averred, that they and the defendants, all being citizens of the United States at the time of the indorsement, respectively dwelt and had their homes; and then aver that on the 11th August, 1830, the bill of exchange was presented to L'Hôtelier Frères, at Bordeaux, for acceptance, according to the custom of merchants, and that they refused to accept; whereupon the bill was duly protested for non-acceptance, and notice given to the defendants. The defendant pleaded: 1. Non-assumpsit; 2. That the bill declared on was made and drawn in the island of Martinique, a country then, since, and now, under the dominion and government of the king of France, by persons there dwelling subjects of the king of France; and that the bill, according to its tenor, was payable at Paris, in the kingdom of France, by persons then and still residing and dwelling at Bordeaux, in the kingdom of France, subjects of the king of France, to wit, on, etc. at, etc.; that the island of Martinique, as well as Paris and Bordeaux, and the persons therein respectively residing, and the drawers and drawees were subject and governed by the laws of the kingdom of France, there and then, and still existing and in force, to wit on, etc. at, etc.; that by the laws of France, then and still at the several places in the plea mentioned, existing and in force, it is established, enacted, and provided, in relation to bills of exchange drawn and payable in the countries subject to the laws of France, among other things, in manner and form following, namely: The drawer and indorsers of a bill of exchange are severally liable for its acceptance and payment at the time it falls due. Code de Commerce, 119. The refusal of acceptance is evidenced by an act denominated protest for non-acceptance, *id.* 120. On notice of the protest for non-acceptance, the indorsers and drawer are respectively bound to give security, to secure the payment of the bill at the time it falls due, or to effect reimbursement of it, with the expense of protest and re-exchange. The time when a bill of exchange becomes due, if payable at one or more days after sight, is fixed by the date of the acceptance, or by the date of the protest for non-acceptance. The holder is not

excused the protest for non-payment by the protest for non-acceptance. After the expiration of the above periods (certain periods specified in the code, and which, in the case of a bill drawn in the West Indies on France, is one year) for the presentment of bills at sight, or one or more days after sight, for protest of non-payment, the holder of the bill loses all his claim against the indorsers, etc. setting forth, besides the above, a variety of other provisions of the French code, relative to bills of exchange, and then averring, that although at the time of the commencement of the action of the plaintiffs, twenty-four days after sight of the bill of exchange declared on had elapsed, from the day when the same was alleged to have been protested for non-acceptance, yet no protest of the said bill for non-payment had been made, concluding with a verification and prayer of judgment. 3. The defendants pleaded, after referring to the matter of inducement stated in the second plea, that on notice of protest for non-acceptance, as alleged in the declaration, they were ready and willing to give security; and offered to the plaintiffs to give security, according to the true intent and meaning of the laws of France, to secure payment of the bill at the time when the same should fall due, to wit, on, etc. at, etc., concluding as in last plea. To the second plea the plaintiffs demurred, and took issue upon the third, denying that the defendants did offer security, etc.

The Superior Court, on the argument of the demurrer, adjudged the second plea to be bad; after which the issues of fact were tried. The jury found for the plaintiffs, on the plea of non-assumpsit, and assessed their damages at \$895.52, and found a verdict for the defendants on the third plea. Notwithstanding which last finding, the court gave judgment for the plaintiffs on the whole record. The defendants sued out a writ of error.

By the court, NELSON, J. The only material question arising in this case is, whether the steps necessary on the part of the holders of the bill of exchange in question, to subject the indorsers upon default of the drawees to accept, must be determined by the French law, or the law of this State? If by our law, the plaintiffs below are entitled to retain the judgment; if by the law of France, as set out and admitted in the pleadings, the judgment must be reversed.

We have not been referred to any case, nor have any been found in our researches, in which the point now presented has been examined or adjudged. But there are some familiar principles belonging to the law merchant, or applicable to bills of exchange and promissory notes, which we think are decisive of it. The persons in whose favor the bill was drawn were bound to present it for acceptance and for payment, according to the law of France, as it was drawn and payable in French territories; and if the rules of law governing them were applicable to the indorsers and indorsees in this case, the recovery below could not be sustained, because presentment for payment would have been essential even after protest for non-acceptance. No principle, however, seems more fully settled, or better understood in commercial law, than

that the contract of the indorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by indorsement is equivalent in effect to the drawing of a bill, the indorser being in almost every respect considered as a new drawer. Chitty on Bills, 142; 3 East, 482; 2 Burr. 674, 5; 1 Str. 441; Selw. N. P. 256. On this ground, the rate of damages in an action against the indorser is governed by the law of the place where the indorsement is made, being regulated by the *lex loci contractus*. 6 Cranch, 21; 2 Kent's Com. 460; 4 Johns. R. 119. That the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made, has been adjudged both here and in England. In *Hix v. Brown*, 12 Johns. R. 142, the bill was drawn by the defendant, at New Orleans, in favor of the plaintiff, upon a house in Philadelphia; it was protested for non-acceptance, and due notice given; the defendant obtained a discharge under the insolvent laws of New Orleans after such notice, by which he was exonerated from all debts previously contracted, and, in that State, of course from the bill in question. He pleaded his discharge here, and the court say, "It seems to be well settled, both in our own and in the English courts, that the discharge is to operate according to the *lex loci* upon the contract where it was made or to be executed. The contract in this case originated in New Orleans, and had it not been for the circumstance of the bill being drawn upon a person in another State, there could be no doubt but the discharge would reach this contract; and this circumstance can make no difference, as the demand is against the defendant as drawer of the bill, in consequence of the non-acceptance. The whole contract or responsibility of the drawer was entered into and incurred in New Orleans. The case of *Peters v. Brown*, 5 East, 124, contains a similar principle. See also 3 Mass. R. 81; *Van Raugh v. Van Arsdaln*, 3 Caines, 154; 1 Cowen, 107; 6 Cranch, 221; 4 Cowen, 512, *n*.

The contract of indorsement was made in this case, and the execution of it contemplated by the parties in this State; and it is therefore to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn, are equally applicable to the indorser; for, in respect to the holder, he is a drawer. Adopting this rule and construction, it follows that the law of New York must settle the liability of the defendants below. The bill in this case is payable twenty-four days after sight, and must be presented for acceptance; and it is well settled by our law, that the holder may have immediate recourse against the indorser for the default of the drawee in this respect. 3 Johns. R. 202; Chitty on Bills, 231, and cases there cited.

Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation; and it is therefore to be presumed that the parties had reference to it. So the protest must be according to the same law, which is not only convenient, but grows out of the necessity of the case. The notice, however, must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made, such being an implied condition. Chitty on Bills, 266, 93, 217; Bayley, 28; Story's Conflict of Laws, 298.

The contract of the drawers in this case, according to the French law, was, that if the holder would present the bill for acceptance within one year from date, it being drawn in the West Indies, and it was not accepted, and was duly protested and notice given of the protest, he would give security to pay it, and pay the same if default was also made in the payment by the drawee after protest and notice. This is the contract of the drawers, according to this law, and the counsel for the plaintiffs in error insists that it is also the implied contract of the indorser in this State. But this cannot be, unless the indorsement is deemed an adoption of the original contract of the drawers, to be regulated by the law governing the drawers, without regard to the place where the indorsement is made. We have seen that this is not so; that notice must be given according to the law of the place of indorsement; and if, according to it, notice of non-payment is not required, none of course is necessary to charge the indorser. But if the above position of the plaintiffs in error be correct, notice could not then be dispensed with, the law of the drawer controlling. The above position of the counsel would also be irreconcilable with the principle, that the indorsement is equivalent to a new bill, drawn upon the same drawee; for then the rights and liabilities of the indorser must be governed by the law of the place of the contract, in like manner as those of the drawer are to be governed by the laws of the place where his contract was made. Both stand upon the same footing in this respect, each to be charged according to the laws of the country in which they were at the time of entering into their respective obligations.

I am aware that this conclusion may operate harshly upon the indorsers in this case, as they may not be enabled to have recourse over on the drawers. But this grows out of the peculiarity of the commercial code which France has seen fit to adopt for herself, materially differing from that known to the law merchant. We cannot break in upon the settled principles of our commercial law, to accommodate them to those of France or any other country. It would involve them in great confusion. The indorser, however, can always protect himself by special indorsement, requiring the holder to take the steps

necessary according to the French law, to charge the drawer. It is the business of the holder, without such an indorsement, only to take such measures as are necessary to charge those to whom he intends to look for payment.

*Judgment affirmed.*¹

ROUQUETTE v. OVERMANN.

QUEEN'S BENCH. 1875.

[*Reported Law Reports, 10 Queen's Bench, 525.*]

THIS was an action brought by the plaintiff as indorsee and holder against the defendants as drawers and indorsers of a bill of exchange. The bill is as follows:

“Manchester, 28th June, 1870. For £345 15s. 2d. sterling. On the 5th of October, 1870, pay this first of exchange (second and third unpaid) to the order of ourselves the sum of £345 15s. 2d. sterling, at the exchange as per indorsement for value received, which place to account as advised.

OVERMANN & SCHOU.

“To Messrs. Magalhaes Frères, 5 Rue Martel, Paris.”

Defendants indorsed the bill to plaintiff in England. The bill was duly presented to the drawees in Paris and accepted by them. Before the time for payment, war having broken out between France and Germany, payment of this and similar instruments was postponed from time to time by the legislative authority in France, and demand of payment before the time fixed forbidden, until a delay of eleven months was finally provided. On the 5th of September, the day on which the extended term of grace expired, the bill was presented for

¹ It is held generally in this country that the nature of the notice required to bind a drawer or indorser to a holder depends upon the law of the place of drawing or indorsement. *Thorp v. Craig*, 10 Ia. 461; *Huse v. Hamblin*, 29 Ia. 501; *Snow v. Perkins*, 2 Mich. 238; *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874; *Raymond v. Holmes*, 11 Tex. 54. *Contra* (by the law of the place of payment of the instrument), *Rothschild v. Currie*, 1 Q. B. 43; *Wooley v. Lyon*, 117 Ill. 244, 6 N. E. 885; *Chew v. Read*, 11 Sm. & M. 182; 3 Clunet, 361 (Paris, 22 March, '75).

So, it has been held, that whether a provision of the bill has the effect of a waiver of notice by the indorsee is determined by the law of the place of making and indorsement. *Dunnigan v. Stevens*, 122 Ill. 396, 13 N. E. 51.

Whether prior judgment against the maker is required before suing the indorser is likewise governed by the law of the place of indorsement. *Williams v. Wade*, 1 Met. 82 (*semble*). And what diligence is necessary to bind drawer or indorser is governed by the law of the place of drawing or indorsement. *Hunt v. Standart*, 15 Ind. 33; *Warner v. Citizens' Bank*, 6 S. D. 152, 60 N. W. 746; *Sirey*, '96, 4, 7 (Cass. Florence, 8 Apr. '95). *Contra* (by law of place of payment), 15 Clunet, 554 (Palermo, 13 Dec. '86).

The form of protest is regulated by the law of the place of protest, *i. e.*, of payment. *Todd v. Neal*, 49 Ala. 266; *Kentucky Com. Bk. v. Barksdale*, 36 Mo. 563; 21 Clunet, 370 (Brussels, 14 June, '93). — *Ed.*

payment, which was refused. The bill was duly protested, according to the French law, on the 6th of September, and notice of dishonor and of the protest duly sent to the defendants. The defendants refused payment.¹

COCKBURN, C. J. The main ground of defence is that due diligence was not used by the holders of the bill in presenting it for payment at the appointed time, or in giving notice of dishonor on its non-payment at that time; by reason of which the indorsers were discharged; whence, as was contended, it followed that the plaintiff had paid the bill in his own wrong, and therefore could not claim to be indemnified by the defendants; who, again, it was said, were entitled on their own account to notice of dishonor on non-payment at the regular time, — it being contended that whatever might be the effect of this special legislation of the French government, as between the holders of the bill and the acceptors, the holders, though resident in France, were bound, the bill having been drawn and indorsed in England, if they desired to fix the parties in this country, to present the bill for payment at the time at which it fell due in the regular course, according to its tenor, and if it was not then paid, to give notice of its dishonor — the right to insist on due diligence in these particulars according to the law of England, as a condition precedent of liability, being one which it was not competent to a foreign legislature to affect. That, at all events, the transaction between the defendants and the plaintiff having occurred in this country, their respective rights and liabilities must be determined by English law. The implied contract of indemnity, which attaches on non-payment of a bill of exchange, is based, it was urged, on the assumption that the bill will be presented for payment at the time specified by it; and that, in case of non-payment, notice of dishonor will thereupon be given. How then, it was asked, can the right to insist on these as the conditions of liability on a bill drawn and indorsed in this country be modified or affected by the legislation of a foreign country?

The question is of considerable importance and interest in a juridical point of view. It has occupied the attention of the tribunals in Germany, Switzerland, and Italy. The High Court of Leipzig has decided it in favor of the view presented to us on the part of the defendants. The High Court of Geneva and the Cour de Cassation of Turin have come to the opposite conclusion. Our view coincides with theirs.

In considering the subject, two questions present themselves. The first, as to what was the effect of this special legislation on the obligations of the acceptors; the second, as to what, if any, was its effect on the rights and liabilities of the drawers and indorsees *inter se*. It is with the second question that we are more immediately concerned; but the consideration of the first may materially assist us towards the satisfactory solution of the second.

¹ This statement of facts is substituted for that of the Chief Justice. Part of the opinion is omitted. — ED.

Now that, so far as the French law was concerned, the effect of the exceptional legislation in question was to substitute, as the time of payment, the expiration of the period of grace afforded by it for the time specified in the bill, and to suspend till then the legal obligation of the acceptors to pay, cannot be doubted. If the bill had been presented for payment on the 5th of October, and payment having been refused, an action had been brought in a French court against the acceptors, whether by a French or foreign holder, the plaintiff must by the effect of the new law have been defeated. Even if the acceptors had been found in this country, and an action had been brought against them in an English court, the result must have been the same. It is well settled that the incidents of presentment and payment must be regulated and determined by the law of the place of performance, — a rule which is strikingly illustrated by the familiar but pertinent example of the effect of days of grace being allowed by the law of the country where a bill of exchange is drawn, but not by the law of the country where it is payable, or *vice versa*, the payment of the bill being, as is well known, deferred till the expiration of the days of grace in the one case, but not so in the other. And this arises out of the nature of the thing, as the acceptor cannot be made liable under any law but his own. It is, indeed, true that, in the present instance, the period of grace has been accorded by *ex post facto* legislation. But this appears to us to make no difference in the result, at all events so far as the obligations of the acceptors are concerned. The power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation.

Such being the effect of this legislation on the liability of the acceptor, we have next to consider its effect on the relative position of the drawer and the drawee or indorsee and holder. It is said that, although the obligations of the acceptor may be determined by the *lex loci* of the country in which the bill is payable, the contract as between the drawer and indorsee must be construed according to the law of the country where the bill was drawn; and, consequently, that in order to make the defendants, the drawers of this bill, liable, the bill should have been presented at the time specified in it, and on non-payment notice of dishonor should thereupon have been given according to the requirements of English law. It is unnecessary to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it as applicable to the substance of the contract, so far as presentment for payment is concerned; still less to a formality required on non-payment in order to enable the holder to have recourse to an antecedent party to the bill. Applied to these incidents of the contract, this reasoning appears to us altogether to overlook the true nature of the contract which a party transferring for value the property in a bill of exchange

makes with the transferee. All that he does is to warrant that the bill shall be accepted by the drawee, and, having been accepted, shall, on being presented at the time it becomes due, be paid. In other words, he engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by the acceptance. His liability, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be those of the surety. To hold otherwise would obviously lead to very startling anomalies. The holder might sue the drawer or indorser before, according to the law applicable to the acceptor, the bill became due; or, the acceptor having refused payment till the expiration of the period of grace thus afforded him by the new law, but on presentment at the end of that time having duly paid, the holder might claim compensation against the indorser in respect of any loss he might have sustained by reason of the delay, although the obligations of the acceptor had been fully satisfied by the payment of the bill. Again, as a bill may be indorsed in different countries before it arrives at maturity, and each indorsement becomes a fresh undertaking with the subsequent parties to the bill for due performance by the acceptor, unless the performance to which the acceptor is bound is made the measure and the limit of each indorser's liability, confusion must arise in determining by what law the rights and liabilities of the different indorsers and indorsees *inter se* shall be governed.

It may be urged, no doubt, that, though it may be true that the parties to a bill of exchange, payable in a foreign country, may be assumed to have contracted for the payment of the bill according to the existing law of the country in which it is to be paid, they cannot be assumed to have contracted on the supposition of that law being altered in the interval prior to the bill becoming due; that, on the contrary, the intention of the parties was that the bill should be paid according to the existing law, and the undertaking of the party transferring it was that it should be so paid; and that such being the effect of the indorsement, the obligation of the indorser cannot, as between him and his indorsee, be affected by *ex post facto* legislation in the foreign country. A strong argument *ab inconvenienti* may also be founded on the serious consequences which may ensue to the holder of a bill of exchange, if the time of payment, as fixed by the bill, may be postponed by subsequent legislation. He may require the money secured by the bill at the precise moment it is to become due; he may have purchased the bill for the purpose of insuring the command of it. The delay in receiving it may involve him in the greatest embarrassment. The indorser ought, therefore, to be held strictly to his undertaking that the bill shall be met at the time stated in it, and contemplated by the parties as the date of payment. That to hold otherwise would be materially to shake the credit and impair the utility of negotiable instruments.

To the first of these arguments it may be answered, that the indorser of a bill guarantees its payment only according to the effect of the bill at the place of payment. He transfers all the right the acceptance gives him against the acceptor, and guarantees that the obligations of the latter, as arising from the acceptance, shall be fulfilled. If, by an alteration of the local law pending the currency of the bill, the obligations of the acceptor are rendered more onerous, those of the indorser become so likewise. Thus, if it were enacted that certain days should be treated as holidays, and that a bill falling due on any one of them should be paid at an earlier date, the indorser, on non-payment of the bill at such earlier date, would become liable from such date. On the other hand, if the time of payment were postponed by a period of grace being allowed, or by an enactment that a bill, falling due on a day appointed to be kept as a holiday, should be payable a day after, — as was done by the Act of 34 & 35 Vict. c. 17, — the period at which the liability of the indorser on non-payment by the acceptor would arise, would be *pro tanto* delayed.

To the second argument it may be answered, that it goes rather to the expediency of such exceptional legislation than to its effect. Further, that the instances in which it is resorted to are so extremely rare as to be little likely to have the effect of lessening the faith in negotiable instruments or diminishing their utility.

If, then, the right of the holder, as against the acceptor and the antecedent parties, can be thus modified in respect of the time of payment, there can be no injustice or hardship towards them in holding him exempted from the obligations of presenting the bill earlier than his right of payment accrues, or of giving notice of dishonor in order to preserve his right of recourse to them.

If the time of payment, which is of the essence of the contract, and the consequent necessity for presentment at the original time can thus be postponed, it would seem to follow that, *à fortiori*, a formality, the necessity for which arises only on the non-fulfilment of his obligation by the acceptor, would follow any alteration introduced by the law in respect of the time at which that obligation was to be discharged. But, independently of this consideration, we are of opinion, on general principles, that notice of dishonor cannot be required until payment has been legally demandable of the acceptor, and has been refused. It is true that if the bill had been presented for payment at the time mentioned in it, the acceptors might, possibly, have omitted to avail themselves of the indulgence accorded by the special law, and might have paid at once. But so might, possibly, the acceptor of a bill under ordinary circumstances, if asked to do so as matter of grace or of special arrangement. The holder of a bill of exchange cannot be held bound to present it for payment till it becomes legally payable, that is to say, payable as matter of right and not of option. Neither, therefore, can he be called upon to give notice of non-payment to the indorser before the time when his right to demand payment of the acceptor has

accrued, and the liability of the indorser, consequent on such refusal, has arisen. There cannot be two different times at which a bill of exchange becomes payable. Suppose the holder had presented this bill for payment at the time specified in it, and payment had been refused by reason of the extension of time afforded by the new law, such presentment would certainly not have dispensed with the necessity of presenting the bill anew, when the period of grace expired, and the liability of the acceptors had arisen; and the omission to present it then would have had the effect of discharging the indorser. If presentment at the expiration of the time allowed by the special law was necessary to fix the legal liability of the acceptor and the indorser, it was only on such presentment and non-payment thereupon that the bill could be treated as dishonored, or that notice of its dishonor could be effectually given so as to charge the indorser. Another ground for holding that presentment and notice of dishonor at the earlier period were not necessary to preserve the right of recourse against the defendants, as drawers and indorsers, is to be found in the reasons assigned for requiring presentment at the appointed time and notice of dishonor immediately on payment being refused. The reason given is, that the drawer, whom it is intended to make liable, may have the earliest opportunity of withdrawing his assets from the acceptor, or resorting to such other remedies against him as the law may afford. But in such a case as the present, as the acceptor remains bound to the holder to pay the bill when presented at the time it becomes legally due, the drawer could not withdraw from him the means of satisfying that liability, or take steps against him for non-fulfilment of an obligation not as yet capable of being legally enforced. . . .

On these grounds we are of opinion that the presentment for payment was made, and the notice of dishonor given, at the right time, and that the foundation on which the defence rests consequently fails.

Our judgment, therefore, must be for the plaintiff.

*Judgment for the plaintiff.*¹

¹ The time for presentment for payment is governed by the law of the place of payment. *Pierce v. Insdeth*, 106 U. S. 546; *Pryor v. Wright*, 14 Ark. 189; *Snow v. Perkins*, 2 Mich. 238 (*semble*); *Kentucky Com. Bk. v. Barksdale*, 36 Mo. 563; *Walsh v. Dart*, 12 Wis. 635; 1 Clunet, 100 (Austrian Consular Ct., 15 April, '72); 1 Clunet, 149 (Sweden, 14 May, '73); 1 Clunet, 209 (Brussels, 29 Apr. '72); 21 Clunet, 370 (Brussels, 14 June, '93); 24 Clunet, 827 (Germ. 11 Dec. '95). *Contra*, 1 Clunet, 185 (R. O. H. G. 21 Feb. '71).—ED.

BOWEN v. NEWELL.

COURT OF APPEALS, NEW YORK. 1855.

[Reported 13 *New York*, 290.]

JOHNSON, J.¹ By the law of the State of Connecticut, where this paper was to be paid, it was payable upon the day when, by its tenor, it became due, without grace. What the law of a foreign country is, can only be determined upon evidence; it is a question of fact. The Superior Court has decided upon evidence derived from the best sources, and of the most unquestionable character, that such is the law of Connecticut, and we see no ground to doubt the correctness of that conclusion. Nor is there any more room to doubt that by the law of this State, the law of Connecticut is to control and govern, in respect to the allowance of grace upon a bill of exchange or check drawn upon and payable at a Bank in that State. (Story, *Conf. of Laws*, 2d ed., § 361.)

The judgment should be affirmed.

*Judgment accordingly.*²

GIBBS v. SEWASTIANOFF.

TRIBUNAL OF COMMERCE, ST. PETERSBURG. 1875.

[Reported 5 *Clunet*, 297.]

WILKINSON & Co., at Ekatherineburg, drew upon Holland Jacques & Co., at London, several bills of exchange, payable on May 20, 1874, to the order of John Dixon Gibbs. The latter transferred it by indorsement, at St. Petersburg, to Sewastianoff. The bills were neither accepted nor paid, and were therefore protested at London on April 16 and May 30, 1874. Gibbs, being called upon as indorser by Sewastianoff to pay the bills, refused to do so in accordance with the Russian law, because the protest for non-payment, dated May 30, was too late and was therefore null. Sewastianoff urged that according to the English law, which alone in this case should be the basis of the judgment, the protest for non-acceptance sufficed to give the holder the right of recourse against the indorser.

THE TRIBUNAL. The consequences and the regularity of protests and signatures with reference to bills of exchange must be judged

¹ Part of the opinion only is given. — Ed.

² The allowance of days of grace is regulated by the law of the place of payment. *Washington Bank v. Triplett*, 1 Pet. 25; *Skelton v. Dustin*, 92 Ill. 49; *Brown v. Jones*, 125 Ind. 375; *Thorp v. Craig*, 10 Ia. 461; *Bank of Orange v. Colby*, 12 N. H. 520; *Pawcatuck Nat. Bank v. Barber*, 22 R. I. 73, 46 Atl. 1095; *Blodgett v. Durgin*, 32 Vt. 361. — Ed.

according to the law of the country where the protests were made or the signatures given. Applying this rule to the case in suit, the regularity of the protest for non-payment should be determined by the English law, the responsibility of the indorser by the Russian law. According to the English law the protest for non-payment of a bill never accepted should be made three days after maturity; the bills in question having been protested the tenth day after maturity, the protest is too late, and consequently the bills must be regarded as not protested. According to the Russian law, the responsibility of the indorser is conditioned on protest for non-acceptance and also for non-payment, and Gibbs, by reason of the nullity of protest for non-payment, is therefore not responsible.

ROTTA v. EHRT.

REICHSOBERHANDELSGERICHT. 1876.

[Reported 21 *Entscheidungen des R. O. H. G.*, 150.]

THE COURT.¹ The bill on which suit is brought is for 885 lire, dated Leipzig, September 14, 1874, and was drawn by the defendant to his own order upon A. L. in Rome at three months from date, that is, December 14, 1874. This was accepted by the drawee in this form: "I accept for 680 lire for the last of March, 1875." This acceptance was therefore limited not only with respect to the amount, but also in relation to the time of payment; and with respect to the latter restriction the bill, if we are to apply the rules of the German mercantile law, is to be regarded as between the holder and prior parties as if acceptance had been absolutely refused. . . .

By the fundamental principles of the German mercantile law there is therefore no doubt that action on the bill, which was protested for the first time on the first of April, 1875, for non-payment, is barred as against the defendant. But whether the provisions of the Commercial Code for the kingdom of Italy of June 25, 1865 (Art. 211, 247, 248) would lead to another result need not be considered; since the liability of the defendant, who drew and indorsed the bill in Germany, upon it is to be determined by the German law of commercial paper, though the drawee lived abroad. See 1 *Entsch.* 292; 11 *ib.* 219; 1 *Samml. Wechselrechtl. Entsch.* 88; 2 *ib.* 82; Goldschmidt in 17 *Zeitschr. f. H. R.* 306. This applies as well to the interpretation and limitations of the right of recourse as to the requisites on which it is conditioned; and therefore the domestic law is applicable to a solution of the question whether presentment of the bill for payment and notice of protest is necessary to preserve the right of recourse and whether these trans-

¹ Part of the opinion is omitted. — Ed.

actions must take place at the time stated in the bill or may be postponed to a later period by the drawee in his acceptance. See Thöl, W. O. p. 84 ; Hartmann, Das Deutsche Wechselrecht, p. 65 ; 19 Entsch. 203.

It is true that according to Art. 86 of the German Bills of Exchange Act the law of that place has to determine the form of a transaction done in exercise and for the preservation of a right in the instrument. The law of the place of payment, therefore, governs in certain respects the time of presentment and protest ; it has to furnish the rule, so far as it has established one, to determine at what hour of the day it is to be presented for payment and protest, what days are to be regarded as holidays, and whether it is entitled to days of grace (1 Entsch. 293). But the question whether the time named in the bill is unalterably fixed for the presentment and protest, or a later date named in the acceptance may serve to postpone the time, is concerned not with the form of presentment and protest, but with the performance of substantial conditions for the existence of the right of recourse ; and these are to be determined, as has been said, by the law of the place where the defendant drew the bill on which recourse is sought.

BLANZY COAL COMPANY v. DAVILLIER.

COURT OF CASSATION, FRANCE. 1900.

[*Reported Sirey and Journal du Palais*, 1900, 1, 161.]

THE COURT. The assignment of the fund on which a bill of exchange is drawn can be effected, like that of the bill itself, only in accordance with the law of the place where the bill was drawn. The holder of a foreign bill in receiving it took it with its own intrinsic nature, and is thereby submitted to the law of the country where it takes effect by delivery.

In this case Fry and Company, of Cardiff, shipped in December, 1893, four cargoes of coal to the Blanz Company ; and to cover the amount of these shipments they drew on December 28, 1893, on the latter company to the order of Davillier, banker, two bills, payable on January 15, following. These bills were not presented for acceptance, but they were protested at maturity for non-payment. The refusal of the Blanz company to honor them was based on these reasons : that they were under no agreement with the drawers, then bankrupt, to pay them, and that since the law of England, which was applicable to the instruments in question, gave the payee no right in the fund, they come upon it as against Davillier for the damages due from Fry and Co. for their breach of other contracts for the sale of coal.

The judgment appealed from refused to allow this contention, upon the ground that the rights and duties of a bailee are determined by the law of the place where his obligation arose, and the mandate whence arose the mutual obligations of the drawer and drawee having been made at the domicil of the latter, these obligations are to be governed by the law of that domicil; and consequently recognized in Davillier a right of property in the fund in accordance with the French law. In refusing to apply the foreign law, which alone should govern the relations of the parties, the judgment violated, by falsely applying it, Article 116 of the Commercial Code.¹ *Judgment reversed.*²

SECTION IX.

(B) OBLIGATIONS OF CARRIERS.

LIVERPOOL AND GREAT WESTERN STEAM COMPANY v. PHENIX INSURANCE CO.

SUPREME COURT OF THE UNITED STATES. 1889.

[Reported 129 *United States*, 397.]

GRAY, J.³ This is an appeal by a steamship company from a decree rendered against it upon a libel in admiralty, "in a cause of action arising from breach of contract," brought by an insurance company, claiming to be subrogated to the rights of the owners of goods shipped on board the "Montana," one of the appellant's steamships, at New York, to be carried to Liverpool, and lost or damaged by her stranding, because of the negligence of her master and officers, in Holyhead Bay on the coast of Wales, before reaching her destination.

In behalf of the appellant, it was contended that the loss was caused by perils of the sea, without any negligence on the part of master and officer; that the appellant was not a common carrier; that it was exempt from liability by the terms of the bills of lading; and that the libellant had not been subrogated to the rights of the owners of the goods. . . .

The circumstances of the case, as found by the Circuit Court, clearly warrant, if they do not require, a court or jury, charged with the duty of determining issues of fact, to find that the stranding was owing to the negligence of the officers of the ship. . . .

¹ "There are funds when at maturity of the bill of exchange the drawee is indebted to the drawer or to the person on whose account it is drawn in an amount at least equal to the amount of the bill." — ED.

² This decision is approved in a learned note to the case by Professor Lyon-Caen, citing many authorities. But see *contra*, *Abt. v. Bank*, 159 Ill. 467, 42 N. E. 856; *Sirey et Jour. du Palais*, '99, 4, 29 (Germany, 23 Mar. '97). — ED.

³ Part of the opinion only is given. — ED.

We are then brought to the consideration of the principal question in the case, namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship.

The question appears to us to be substantially determined by the judgment of this court in *Railroad Co. v. Lockwood*, 17 Wall. 357. . . .

It was argued for the appellant, that the law of New York, the *lex loci contractus*, was settled by recent decisions of the Court of Appeals of that State in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence. *Mynard v. Syracuse Railroad*, 71 N. Y. 180; *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71.

But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State. *Railroad Co. v. Lockwood*, 17 Wall. 357, 368; *Myrick v. Michigan Central Railroad*, 107 U. S. 102; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 511; *Swift v. Tyson*, 16 Pet. 1; *Railroad Co. v. National Bank*, 102 U. S. 14; *Burgess v. Seligman*, 107 U. S. 20, 33; *Smith v. Alabama*, 124 U. S. 365, 478; *Bucher v. Cheshire Railroad*, 125 U. S. 555, 583. The decisions of the State courts certainly cannot be allowed any greater weight in the Federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States.

It was also argued in behalf of the appellant, that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers.

First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts and opinions of commentators in France, Italy, Germany, and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country; and it has been said by many jurists that the law of France, at least, was otherwise. See 2 Pardessus *Droit Commercial*, no. 542; 4 Goujet & Meyer *Dict. Droit Commercial* (2d ed.) *Voiturier*, nos. 1, 81; 2 Troplong *Droit Civil*, nos. 894, 910, 942, and other books cited in *Peninsular & Oriental Co. v. Shand*, 3 Moore P. C. (N. S.) 272, 278, 285, 286; 25 Laurent *Droit Civil Français*, no. 532; Mellish, L. J., in *Cohen v. Southeastern Railway*, 2 Ex. D. 253, 257.

Second. The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof; and no rule of the general maritime law (if any exists) concerning the validity of such a stipulation as that now before us has ever been adopted in the United States or in England, or recognized in the admiralty courts of either. The *Lottawanna*, 21 Wall. 558; The *Scotland*, 105 U. S. 24, 29, 33; The *Belgenland*, 114 U. S. 355, 369; The *Harrisburg*, 119 U. S. 199; The *Hamburg*, 2 Moore P. C. (N. S.) 289, 319; s. c. *Brown. & Lush*. 253, 272; *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 123, 124; s. c. 6 B. & S. 100, 134, 136; The *Gaetano & Maria*, 7 P. D. 137, 143.

It was argued in this court, as it had been below, that as the contract was to be chiefly performed on board of a British vessel and to be finally completed in Great Britain, and the damage occurred in Great Britain, the case should be determined by the British law, and that by that law the clause exempting the appellant from liability for losses occasioned by the negligence of its servants was valid. . . .

It appears by the cases cited in behalf of the appellant, and is hardly denied by the appellee, that under the existing law of Great Britain, as declared by the latest decisions of her courts, common carriers, by land or sea, except so far as they are controlled by the provisions of the Railway and Canal Traffic Act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants. The *Duero*, L. R. 2 Ad. & Ec. 393; *Taubman v. Pacific Co.*, 26 Law Times (N. S.) 704; *Steel v. State Line Steamship Co.*, 3 App. Cas. 72; *Manchester &c. Railway v. Brown*, 8 App. Cas. 703. It may therefore be assumed that the stipulation now in question, though invalid by our law, would be valid according to the law of Great Britain.

The general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated before the Declaration of Independence by Lord Mansfield (as reported by Sir William Blackstone, who had been of counsel in the case) as follows: "The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, when the parties (at the time of making the contract) had a view to a different kingdom." *Robinson v. Bland*, 1 W. Bl. 234, 256, 258; s. c. 2 Bur. 1077, 1078.

The recent decisions by eminent English judges, cited at the bar, so clearly affirm and so strikingly illustrate the rule, as applied to cases more or less resembling the case before us, that a full statement of them will not be inappropriate.

In *Peninsular & Oriental Co. v. Shand*, 3 Moore P. C. (N. S.) 272, 290, Lord Justice Turner, delivering judgment in the Privy Council, reversing a decision of the Supreme Court of Mauritius, said, "The

general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."

It was accordingly held, that the law of England, and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject to carry him hence by way of Alexandria and Suez to Mauritius, and containing a stipulation that the company should not be liable for loss of passengers' baggage, which the court in Mauritius had held to be invalid by the French law. 3 Moore P. C. (N. S.) 278.

Lord Justice Turner observed, that it was a satisfaction to find that the Court of Cassation in France had pronounced a judgment to the same effect, under precisely similar circumstances, in the case of a French officer taking passage at Hong Kong, an English possession, for Marseilles in France, under a like contract, on a ship of the same company, which was wrecked in the Red Sea, owing to the negligence of her master and crew. *Julien v. Peninsular & Oriental Co.*, imperfectly stated in 3 Moore P. C. (N. S.) 282, note, and fully reported in 75 Journal du Palais (1864), 225.

The case of *Lloyd v. Guibert*, 6 B. & S. 100; s. c. L. R. 1 Q. B. 115, decided in the Queen's Bench before, and in the Exchequer Chamber after, the decision in the Privy Council just referred to, presented this peculiar state of facts: A French ship owned by Frenchmen was chartered by the master, in pursuance of his general authority as such, in a Danish West India island, to a British subject, who knew her to be French, for a voyage from St. Marc in Hayti to Havre, London, or Liverpool at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage, the ship sustained damage from a storm which compelled her to put into a Portuguese port. There the master lawfully borrowed money on bottomry, and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded in an English court of admiralty against the ship, freight and cargo, which being insufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship; and they abandoned the ship and freight in such a manner as by the French law absolved them from liability. It was held, that the French law governed the case, and therefore the plaintiff could not recover.

It thus appears that in that case the question of the intent of the

parties was complicated with that of the lawful authority of the master ; and the decision in the Queen's Bench was put wholly upon the ground that the extent of his authority to bind the ship, the freight or the owners, was limited by the law of the home port of the ship, of which her flag was sufficient notice. 6 B. & S. 100. That decision was in accordance with an earlier one of Mr. Justice Story, in *Pope v. Nickerson*, 3 Story, 465 ; as well as with later ones in the Privy Council, on appeal from the High Court of Admiralty, in which the validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given. *The Karnak*, L. R. 2 P. C. 505, 512 ; *The Gætano & Maria*, 7 P. D. 137. See also *The Woodland*, 7 Bened. 110, 118, 14 Blatchf. 499, 503, and 104 U. S. 180.

The judgment in the Exchequer Chamber in *Lloyd v. Guibert* was put upon somewhat broader ground. Mr. Justice Willes, in delivering that judgment, said : " It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situated in another country, and so forth ; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made ; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract." L. R. 1 Q. B. 122, 123, 6 B. & S. 133.

It was accordingly held, conformably to the judgment in *Peninsular & Oriental Co. v. Shand*, above cited, that the law of England, as the law of the place of final performance or port of discharge, did not govern the case, because it was " manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby." although as to the mode of delivery the usages of Liverpool would govern. L. R. 1 Q. B. 125, 126 ; 6 B. & S. 137. It was then observed that the law of Portugal, in force where the bottomry bond was given, could not affect the case ; that the law of Hayti had not been mentioned or relied upon in argument ; and that " in favor of the law of Denmark, there is the cardinal fact that the contract was made in Danish territory, and further, that the first act done towards performance was weighing anchor in a Danish port ; " and it was finally, upon a view of all the circumstances of the case, decided that the law of France, to which the ship and her owners belonged, must govern the question at issue.

The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark, in force where it was made, was not overcome in favor of the law of England, by the fact that the voyage was to an English port and the charterer an Englishman, nor in favor of the law of Portugal by the fact that the bottomry bond was given in a Portuguese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer, making a charter party in the French language of a French ship, in a port where both were foreigners, to be performed partly there by weighing anchor for the port of loading (a place where both parties would also be foreigners), partly at that port by taking the cargo on board, principally on the high seas, and partly by final delivery in the port of discharge, must have intended to look to the law of France as governing the question of the liability of the owner beyond the value of the ship and freight.¹ . .

This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.

There does not appear to us to be anything in either of the bills of lading, in the present case, tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made.

The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped "in and upon the steamship called 'Montana,' now lying in the port of New York and bound for the port of Liverpool," and are to be delivered at Liverpool. It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is in a memorandum in the margin, as follows: "Guion Line. United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St." No distinc-

¹ The learned Judge here examined the following cases: *Chartered Bank of India v. Netherlands S. N. Co.*, 9 Q. B. D. 118, 10 Q. B. D. 521; *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589; *Watts v. Camors*, 115 U. S. 353; *Pope v. Nickerson*, 3 Story, 465; *Morgan v. R. R.*, 2 Woods, 244; *Hale v. N. J. S. N. Co.*, 15 Conn. 538; *Dyke v. Erie Ry.*, 45 N. Y. 113; *McDaniel v. C. & N. W. Ry.*, 24 Ia. 412; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Brown v. C. & A. R. R.*, 83 Pa. 316; *Curtis v. D. & L. R. R.*, 74 N. Y. 116; *Barter v. Wheeler*, 49 N. H. 9; *Gray v. Jackson*, 51 N. H. 9.—ED.

tion is made between the places of business 'at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, "to tranship the goods by any other steamer," would permit transshipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but "according to York-Antwerp rules," which are the rules drawn up in 1864 at York in England, and adopted in 1877 at Antwerp in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lowndes on General Average (3d ed.), Appendix Q.

The contract being made at New York, the shipowner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. *Peninsular & Oriental Co. v. Shand, Lloyd v. Guibert, and Chartered Bank of India v. Netherlands Steam Navigation Co.,* before cited.

There is even less ground for holding the three bills of lading of the cotton to be English contracts. Each of them is made and dated at Nashville, an inland city, and is a through bill of lading, over the Louisville and Nashville Railroad and its connections, and by the Williams and Guion Steamship Company, from Nashville to Liverpool; and the whole freight from Nashville to Liverpool is to be "at the rate of fifty-four pence sterling per 100 lbs. gross weight." It is stipulated that the liability of the Louisville and Nashville Railroad and its connections as common carriers "terminates on delivery of the goods or property to the steamship company at New York, when the liability of the steamship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line." And in the margin is this significant reference to a provision of the statutes of the United States, applicable to the ocean transportation only: "ATTENTION OF SHIPPERS IS CALLED TO THE ACT OF CONGRESS OF 1851: 'Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches [or] gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall

forfeit to the United States one thousand dollars.'” Act of March 3, 1851, c. 43, § 7; 9 Stat. 636; Rev. Stat. § 4288.

It was argued that as each bill of lading, drawn up and signed by the carrier and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have intended to be bound by that stipulation, and must therefore, the stipulation being void by our law and valid by the law of England, have intended that their contract should be governed by the English law; and one passage in the judgment in *Peninsular & Oriental Co. v. Shand* gives some color to the argument. 3 Moore P. C. (n. s.) 291. But the facts of the two cases are quite different in this respect. In that case, effect was given to the law of England, where the contract was made; and both parties were English, and must be held to have known the law of their own country. In this case, the contract was made in this country, between parties one residing and the other doing business here; and the law of England is a foreign law, which the American shipper is not presumed to know. Both parties or either of them may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this court, it was void. In either aspect, there is no ground for inferring that the shipper, at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he is not shown, and cannot be presumed, to have had any knowledge of.

Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial.

This conclusion is in accordance with the decision of Judge Brown in the District Court of the United States for the Southern District of New York in the *Brantford City*, 29 Fed. Rep. 373, which appears to us to proceed upon more satisfactory grounds than the opposing decision of Mr. Justice Chitty, sitting alone in the Chancery Division, made since this case was argued, and, so far as we are informed, not reported in the Law Reports, nor affirmed or considered by any of the higher courts of Great Britain. *In re Missouri Steamship Co.*, 58 Law Times (n. s.) 377.

The present case does not require us to determine what effect the

courts of the United States should give to this contract, if it had expressly provided that any question arising under it should be governed by the law of England.¹

DIKE v. ERIE RAILWAY. *Wes M. 4*

COURT OF APPEALS, NEW YORK. 1871. *97*

[*Reported 45 New York, 113.*]

APPEALS from the General Term of the Supreme Court in the Second District in Dike's case, and from the General Term of the Supreme Court in the Sixth District in Floyd's case.

These actions were to recover damages for personal injuries sustained by the plaintiffs while passing over the road of the defendant as passengers, caused by the negligence of the defendant's servants and agents. The defendant is a corporation existing under the laws of the State of New York, owning and operating a railroad for the carriage of freight and passengers between the cities of Buffalo and New York, in that State, and the intermediate places, running its road, *en route* between the termini named, for short distances in the States of Pennsylvania and New Jersey by the permission of those States respectively.

Each of the plaintiffs purchased a ticket and took passage on the defendant's road, on the 14th of April, 1868, from stations in this State to the city of New York, and while in transit from the place of departure to the city of New York, and upon a part of the road in the State of Pennsylvania, sustained the injuries complained of. By an act of the legislature of Pennsylvania, passed April 4, 1868, the recovery in actions then or thereafter instituted against common carriers or railroad corporations for personal injuries is limited to \$3,000. Upon the trials, it was claimed in behalf of the defendant that the rights of recovery of the plaintiffs were controlled by this act. The claim was overruled by the judge, and each of the plaintiffs had verdicts in excess of the limit prescribed by the Pennsylvania statute, Dike for \$35,000, at the King's Circuit, and Floyd for \$15,000 at the Tioga Circuit, and judgments upon such verdicts were affirmed by the

¹ *Acc. Hale v. N. J. S. N. Co.*, 15 Conn. 539; *Pennsylvania Co. v. Fairchild*, 69 Ill. 261; *Brockway v. American Ex. Co.*, 171 Mass. 158, 50 N. E. 626; *Davis v. C. M. & S. P. Ry.*, 93 Wis. 470, 67 N. W. 16; 8 Clunet, 72 (Cass. Belg. 30 Jan. '79); 26 Clunet, 420 (Holland, 17 May '97).

The English cases hold the charter-party or bill of lading to be regulated by the law of the flag. *Peninsular & O. S. N. Co. v. Shand*, 3 Moo. P. C. n. s. 272; *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *The August*, [1891] P. 328. If, however, the facts clearly indicate an intention to be bound by another law, the instrument is governed by such law. *The Industrie*, [1894] P. 58. — Ed.

Supreme Court at the General Terms. The defendant has appealed to this court.¹

ALLEN, J. The only question to be considered upon this appeal is as to the effect of the Pennsylvania statute, limiting the amount of the recovery in actions of this character. It is conceded that the statutes of one State are not obligatory upon the courts of other States; that they have not *proprio vigore*, the force of law beyond the limits of the State enacting them. But it is sought to bring these actions within the operation and effect of the foreign statute upon the ground that the contracts were made with reference to the laws of that State, and the causes of action arose there.

The generally received rule for the interpretation of contracts is that they are to be construed and interpreted according to the laws of the State in which they are made unless from their terms it is perceived that they were entered into with a view to the laws of some other State. The *lex loci contractus* determines the nature, validity, obligation, and legal effect of the contract, and gives the rule of construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as when it is to be performed in another place, and then in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation. *Prentiss v. Savage*, 13 Mass. 20; *Medbury v. Hopkins*, 3 Con. 472; *Everett v. Vendryes*, 19 N. Y. 436; *Hoyt v. Thompson's Exr.*, id. 207; *Curtis v. Leavitt*, 15 N. Y. 227. The contracts before us were made in the State of New York, and between citizens of that State. The plaintiffs were actual inhabitants, and the defendant was a corporation existing by the laws of that State. The contracts were for the carriage and conveyance of the plaintiffs over the road of the defendant, between two places in the same State, to wit, from stations on the line of the road, in the western part of the State to the city of New York. The duty and obligation of the defendant, in the performance of the contracts, commenced and ended within the State of New York. Although the route and line of the defendant's road between the places at which the plaintiffs took their passage and their destination passed through portions of the States of Pennsylvania and New Jersey, by the consent of those States respectively, the parties cannot be presumed to have contracted in view of the laws of those States. The contracts were single and the performance one continuous act. The defendant did not undertake for one specific act, in part performance in one State, and another specific and distinct act in another of the States named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania was a part of the single act of transportation from Attica, or Waverly, in the State of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this State, and which was indivisible. The

¹ Arguments of counsel are omitted. — Ed.

obligation was created here, and by force of the laws of this State, and force and effect must be given to it, in conformity to the laws of New York (*Carnegie v. Morrison*, 2 Metc. 381, Per Shaw, Ch. J.) The performance was to commence in New York, and to be fully completed in the same State, but liable to breach, partial or entire, in the States of Pennsylvania and New Jersey, through which the road of the defendant passed, but whether the contract was broken, and if broken, the consequences of the breach should be determined by the laws of this State. It cannot be assumed that the parties intended to subject the contract to the laws of the other States, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those States and the *lex loci contractus*. The case of the *Peninsular and Oriental Steam Navigation Co. v. Shand* (3 Moo. P. C. N. S. 272), is somewhat analogous in principle to the case at bar. A passenger, by an English vessel belonging to an English company, from Southampton to Mauritius *via* Alexandria and Suez, sustained a loss of his baggage between Alexandria and Mauritius, and it was held that the contract for the passage was to be interpreted by the law of England, the place where the contract was made. The Supreme Court at Mauritius had held that the contract was governed by the French law in force in Mauritius, and refused to the defendants the benefit of an exemption from liability for loss of property, to which they were entitled by the terms of the contract as interpreted by the laws of England, and the judgment was reversed, upon appeal, by the Privy Council.

Whether the actions are regarded as actions of assumpsit upon the contracts, or as actions upon the case for negligence, the rights and liabilities of the parties must be judged by the same standard. The form of the action concerns the remedy, but does not affect the legal obligations of the parties. In either form of action the liability of the defendant, and the rights of the plaintiffs, are based upon the contracts. The defendant owed no duty to the plaintiffs, except in virtue of the contracts, and the obligations for the violation and breach of which an action may be brought are only co-extensive with the contracts made. It follows, that the law of Pennsylvania cannot enlarge or restrict the liability of parties to a contract, which for its validity, effect, and construction, is subject to the laws of New York. The damages to which a party is entitled upon the breach of a contract, or violation of a duty growing out of a contract, and the rule and measure of damages pertains to the right and not to the remedy. It is matter of substance, and the principal thing sought, and not a mere incident to the remedy for the principal thing. It is conceded that the statutes of Pennsylvania have no intrinsic extraterritorial force, and that they bind only within the jurisdictional limits of the State. Upon principles of comity, effect is sometimes given by the courts of a State to foreign laws. In matters of contract, such effect is accorded to statutes of other States, only to carry out the intent of and do justice between the parties, never

to qualify or vary the effect of a contract between parties not citizens of such foreign State, or subject to its laws, and not made in view of the laws of such State. Effect will not be given by the courts of a State to foreign laws in derogation of the contracts, or prejudicial to the rights of citizens. *Liverpool, Brazil, &c. Steam Navigation Company v. Benham*, 2 Law Rep. P. C. Cases, 193; *Hale v. N. J. St. Nav. Co.*, 15 Conn. 539; *Arnott v. Redfern*, 2 Carr. & Payne, 88; *Gale v. Eastman*, 7 Met. 14.

The actions are not given by the laws of Pennsylvania. They grow out of the contracts and the duties resulting from the contracts, and are given by the common law, and, therefore, the laws of another State in an action brought here cannot prescribe the measure of damages, or limit the liability of the parties.

*Judgment affirmed.*¹

*from Conn. to Ia. destroyed
B/L exempted from loss
by Conn. & Ill. law, not*

*per-
v. in
law
A. J.*

TALBOTT v. MERCHANT'S DESPATCH TRANSPORTATION CO.

SUPREME COURT OF IOWA. 1875.

[*Reported 41 Iowa, 247.*]

THIS action is brought to recover the value of four cases of boots, delivered by plaintiff's agents to defendant, a common carrier, at Hartford, Conn., to be transported by said defendant to Des Moines, Iowa. The plaintiff alleges the acceptance of the goods, an agreement to carry, and the failure to deliver, and claims the value thereof — \$220.38. The defendant, by answer, admits that it is a common carrier, the receipt of the goods and the failure to deliver, and avers want of knowledge as to value. The defendant also avers that by the express terms of said agreement, the goods were to be transported and delivered in Des Moines, in like order as they were received, damages from fire excepted; and that without any fault or negligence of said defendant, said cases of boots were, at Chicago, Illinois, destroyed by fire (in the great conflagration of October, 1871), while in transit from Hartford to Des Moines. The bill of lading containing the agreement was annexed as an exhibit to the answer, and it shows the receipt of the goods in good order and the marks thereon, and states that said four cases of boots are "to be forwarded in like good order (dangers of navigation, collision, and fire, and loss occasioned by mob, riot, insurrection, or rebellion, and all dangers incident to railroad trans-

¹ In a few cases it is held that a limitation of liability is governed by the law of the place of contracting where the carriage is to be through that and other States, because the contract is entire and the laws of several places of performance cannot be applied. *Ill. Cent. R. R. v. Beebe*, 174 Ill. 13, 50 N. E. 1019; *R. R. v. Exposit. C. Mills*, 81 Ga. 522, 7 S. E. 916. — ED.

portation excepted), to depot only, he, or they paying freight and charges for the same as below."

The plaintiff demurred to the answer because: 1. It does not allege that plaintiff has assented to the alleged agreement. 2. It does not show that the loss of said goods occurred through any exception mentioned. 3. The agreement stipulated for absolute exemption from liability, even though the loss occurs through the negligence of defendant, and is therefore against public policy, and void.

This demurrer was sustained, and, the defendants electing to stand upon the answer, judgment was rendered for plaintiff for the amount of the claim. The defendant appeals.¹

COLE, J. It is conceded by the respective counsel that the contract as shown by the bill of lading, containing exceptions from liability for loss by fire, was valid and binding in Connecticut. *Lawrence v. N. Y. P. B. R. R. Co.*, 36 Conn. 63; and in Illinois, *I. C. R. R. Co. v. Morrison*, 19 Ill. 24. And that, by Chap. 13, Laws of 11th G. A. of Iowa, it was enacted "that in the transportation of persons or property by any railroad or other company, or by any person or firm engaged in the business of transportation of persons or property, no contract, receipt, rule, or regulation shall exempt such railroad or other company, person, or firm from the full liabilities of a common carrier, which in the absence of any contract, receipt, rule, or regulation would exist with respect to such persons or property" (see Laws of 1866, p. 121), and that thereby the exceptions in the bill of lading in this case would be inoperative and void in Iowa. The main question, therefore, presented in this case is, whether the contract of affreightment shall be governed by the laws of Connecticut or of Iowa. Respecting the general rule that a contract valid where made is valid everywhere, and that where a contract specifies a place of performance it is to be interpreted by the law of that place, the counsel are also agreed. The question of difficulty in this case is in determining the place of the performance of the contract.

It was held by this court in *McDaniels v. The C. & N. W. Ry. Co.*, 24 Iowa, 412, that a contract of affreightment made in Iowa for the transportation of cattle by railroad from Clinton, Iowa, to Chicago, Illinois, and for their delivery at the latter place, was to be determined by the laws of Iowa, for that the contract was made in Iowa, and was therein partly to be performed. Applying the rule of that case to this, it seems necessarily to follow, that since this contract was made in Connecticut and was there to be partly performed, its validity and effect should be determined by the law of that State. But, without determining that such a rule should be applied to its full extent to every contract or even to this, we here ground our decision of this cause upon the special facts of the case which show that the contract as made was valid in Connecticut, where the contract was made, and in Illinois, where the loss occurred. Whether a different rule would apply if the

¹ Arguments of counsel are omitted. — Ed.

defendants had entered upon the performance of their contract in Iowa and the loss had there occurred, we need not determine.

Our conclusion in this case may be rested upon the general principle, that when there are several possible local laws applicable to the case, that law is to be applied which is most favorable to the contract; or, to state the same rule in other phraseology, when there is a conflict of applicatory laws the parties are presumed to have made part of their agreement that law which is most favorable to its validity and performance. See Wharton on Conflict of Laws, § 429, and authorities there cited; *Arnold v. Potter*, 22 Iowa, 194. The answer, by its admission of the execution of the agreement, by fair implication, if not necessarily, admits that it was accepted or assented to by the plaintiff. Such acceptance, without more, would bind him. See *Mulligan v. Ill. Cent. R. R. Co.*, 36 Iowa, 181.

A fair construction of the exception would exempt the defendant from liability from loss, without its negligence, by fire, although such fire did not result from collision. In other words, the exception relates to the loss either by collision or fire, and not alone from loss resulting from "collisions and fire." Our conclusion, therefore, is that the answer presents a sufficient defence and that the court erred in sustaining a demurrer thereto.

*Reversed.*¹

*1 to N.Y. Pa. statute
§ 200 in N.Y.*

162 **CURTIS v. DELAWARE, LACKAWANNA, AND WESTERN
RAILROAD.**

COURT OF APPEALS, NEW YORK. 1878.

[*Reported 74 New York, 116.*]

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial, without a jury.

This action was brought to recover for the loss of a trunk and its contents. The court found, in substance, that plaintiff, on the 9th of October, 1875, took passage on defendant's road from Scranton, Pennsylvania, to New York City, leaving his baggage to be brought by his wife; that, on the 16th of October, 1875, plaintiff's wife and infant son took passage at Scranton for New York, with his and their baggage, consisting of personal clothing, all of which was his property; that the baggage was brought safely by defendant to New York, and was there lost through its negligence.

That by a general act of the Legislature of said Commonwealth of Pennsylvania, passed on the 11th day of April, 1867, and at all times since and still in force, it was enacted and declared as follows:—

“Section 1. Each passenger upon a railroad shall have the right to

¹ See *Hazel v. C. M. & S. P. Ry.*, 82 Ia. 477, 48 N. W. 926.—Ed.

have carried in the car or place provided for that purpose, in the train in which he or she may be a passenger, his or her personal clothing, not exceeding, inclusive of the trunk or box in which it may be contained, one hundred pounds in weight, and \$300 in value."

"Section 2. No railroad company shall, under any circumstances, be liable for loss or damage of any baggage or property belonging to any such passenger, beyond the said sum of \$300, unless it shall be proven that the excess in value thereof over that sum was duly declared to the agents of the company at the time of its delivery for transportation, and the sum charged by the railroad company for such transportation over and above passage fare was paid :

"Provided, however, that the said declaration shall not relieve the claimant from proving the actual value of the articles alleged to have been lost or damaged; but in no event shall there be any recovery beyond the value thus declared."

Further facts appear in the opinion.¹

MILLER, J. The right of a passenger to recover of a railroad corporation damages arising by reason of a loss of baggage, while travelling upon the railroad, is fully established, and according to the laws of this State there can be no question as to the liability of such company for the loss actually sustained, when it fails to fulfil the contract with the traveller, or is chargeable with negligence, by which the damages are caused. The baggage, for which a recovery was had, was delivered to the defendant at Scranton, in the State of Pennsylvania, to be transported to and delivered in the city of New York. The first question which arises upon this appeal is whether the statute of the State of Pennsylvania, passed in 1867, which limits and defines the liability of railroad corporations upon contracts entered into by them for the transmission of baggage, forms a part of the contract between the plaintiff and the defendant, and should be considered as determining the right to recover and the amount of the recovery. I think that the statute cited has no application, and that the rights of the parties must be determined in accordance with the laws of the State of New York, which are applicable to such contracts, as is manifest by referring to the principles which govern contracts of this description. One of the rules applicable to the subject is that the *lex loci contractus* is to govern, unless it appears upon the face of the contract that it was to be performed in some other place, or made with reference to the laws of some other place, and then the rule of interpretation is governed by the law of the place. *Dyke v. Erie Railway Co.*, 45 N. Y. 113; *Sherrill v. Hopkins*, 1 Cow. 103. The place of delivery was a material and important part of the contract, and until such delivery, the same was not completed and fulfilled. Upon a failure to deliver the baggage to the plaintiff, in the city of New York, there was a breach of the contract; and as the final place of performance was in that city, it would seem to follow that, within the rule laid down, the contract was

¹ Arguments of counsel and part of the opinion are omitted. — Ed.

to be governed, at least so far as a delivery is concerned, by the laws of New York. This certainly was to be done in a different place from where the contract was made, and it is a reasonable inference that it was in the contemplation of the parties at the time, and that it was entered into with reference to the laws of the place where it was to be delivered. So also, when it appears that the place of performance was different from the place of making the contract, it is to be construed according to the laws of the place where it is to be performed. *Sherrill v. Hopkins*, *supra*, p. 108, and authorities there cited; *Thompson v. Ketcham*, 8 Johns. 189; 4 Kent's Com. 459. The place of final performance of the contract being in the city of New York, although the transportation was mostly through other States, no reason exists why a failure to deliver the baggage should not be controlled by the laws which prevail at the place of delivery. It is said that the contract is entire and indivisible, and we are referred to some cases outside of this State, which, it is claimed, sustain the doctrine that the locality where the contract was made, in cases of this character, must control. None of the cases cited are entirely similar to the one at bar and do not involve the precise point now considered. But even were it otherwise, they are not, I think, controlling, as no reason exists why a contract to deliver baggage should not be governed by the laws of the place where the baggage is to be delivered.

*action to Elmira.
x out of liab., Pa. not. Duplicity in Pa.
formable in Pa., and Pa. law governs.*

BURNETT v. PENNSYLVANIA RAILROAD.

SUPREME COURT OF PENNSYLVANIA. 1896.

[Reported 176 *Pennsylvania*, 45.]

FELL, J. The refusal of the court to charge that "as the contract for transportation was made in New Jersey it will be enforced in this State as in that, and as the defendant was released from responsibility by the free pass the verdict must be for the defendant," raises the only question to be considered. The plaintiff was employed by the defendant as a flagman at Trenton, N. J. He applied for and was granted free transportation for himself, his wife and daughter, to Elmira, N. Y. He received two passes, — one from Trenton to Philadelphia, the terms of which do not appear in evidence; the other, an employee's trip pass from Philadelphia to Elmira, by the terms of which he assumed all risks of accident. He was injured at Harrisburg, Pa., through the admitted negligence of the defendant's employees.

It was proved at the trial that under the laws of New Jersey the contract by which the plaintiff in consideration of free transportation assumed the risk of accident was valid, and that in that State he could not recover; and it is conceded that in Pennsylvania the decisions are

otherwise, and that such a contract will not relieve a common carrier from responsibility for negligence. *Goldey v. Penna. R. R. Co.*, 30 Pa. 242; *Penna. R. R. Co. v. Henderson*, 51 Pa. 315; *Penna. R. R. Co. v. Butler*, 57 Pa. 335; *Buffalo, Pittsburg & Western R. R. Co. v. O'Hara*, 12 W. N. C. 473. The question then is: By the laws of which State is the responsibility of the defendant to be determined?

The defendant is a corporation of the State of Pennsylvania. The injury occurred in the operation of its road in this State. The passes, although issued and delivered in New Jersey, were for transportation from the station in Trenton directly across the Delaware river into this State. The service was to be rendered here; this was the place of performance.

Generally as to its formalities and its interpretation, obligation, and effect, a contract is governed by the laws of the place where it is made, and if it is valid there it is valid everywhere; but when it is made in one State or country to be performed in another State or country its validity and effect are to be determined by the laws of the place of performance. It is to be presumed that parties enter into a contract with reference to the laws of the place of performance, and unless it appears that the intention was otherwise those laws determine the mode of fulfilment and obligation and the measure of liability for its breach. *Daniel on Negotiable Instruments*, 658; *Byles on Bills*, 586; 2 *Kent's Commentaries*, 620; *Wharton on the Conflict of Laws*, § 401; *Story on the Conflict of Laws*, § 280; *Scudder v. Union National Bank*, 91 U. S. 406; *Brown v. C. & A. R. R. Co.*, 83 Pa. 316; *Waverly Bank v. Hall*, 150 Pa. 466. The decision in *Brown v. C. & A. R. R. Co.* (*supra*) seems to be conclusive of this case. In that case a ticket was issued in Philadelphia by a New Jersey corporation operating a railroad in that State, and the plaintiff's trunk was delivered to the defendant in Philadelphia, and it did not appear where it had been lost. The liability being admitted, the question was whether the laws of Pennsylvania limiting the amount of liability applied. It was held that as the service was to be rendered by a New Jersey corporation in New Jersey the laws of the place of performance controlled. It was said in the opinion by SHARSWOOD, J.: "The negligence of which the defendants are presumed to have been guilty was in the course of the exercise of their franchises as a New Jersey corporation, and the extent of their liability is therefore to be determined by the laws of that State."

*The judgment is affirmed.*¹

¹ *Acc. Barter v. Wheeler*, 49 N. H. 9. — ED.

LORING *v.* NEPTUNE INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1838.

[Reported 20 *Pickering*, 411.]

SHAW, C. J.¹ The general average in the present case was made up and adjusted at Hamburg, the port of destination, at which the several interests liable to contribute were necessarily to be separated from each other. Hamburg therefore was the proper place for the adjustment and payment of this general average. Such general average must necessarily be adjusted according to the laws and usages of the place where the adjustment was made.²

SECTION IX.

(C) OBLIGATIONS QUASI EX CONTRACTU.

BRACKETT *v.* NORTON.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1823.

[Reported 4 *Connecticut*, 517.]

HOSMER, C. J.³ The general question in the case is whether the law implies a contract that the defendant shall pay the plaintiff for the services performed by him. . . . The services of the defendant having been rendered in the State of New York, under a contract made in that State, their laws are the standard by which the case must be determined.⁴ . . .

¹ Part of the opinion only is given. — ED.

² *Acc.* *Simonds v. White*, 2 B. & C. 805; 1 *Clunet*, 133 (R. O. H. G. 28 Dec. '72); 5 *Clunet*, 599 (Rouen, 20 Mar. '78); 8 *Clunet*, 311 (Holland, 11 Feb. '78); 20 *Clunet*, 949 (Antwerp, 14 Jan. '92).

If the voyage is completely broken up at an intermediate port of refuge, it has been held that the adjustment of general average should be according to the law there prevailing. *Mavro v. Ins. Co.*, L. R. 10 C. P. 414. In Norway, however, it has been held that it should be adjusted at the port of refuge according to the law of the port of intended destination. 15 *Clunet*, 151 (25 Mar. '86). If after disaster the cargo is forwarded to destination, general average should then at any rate be computed according to the law of the port of destination. *Nat. Board v. Melchers*, 45 Fed. 643. — ED.

³ Part of the opinion only is given. — ED.

⁴ *Acc.* *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456. — ED.

APPENDIX TO VOLUME II.

NORTON v. FLORENCE LAND AND PUBLIC WORKS COMPANY.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1877.

[*Reported 7 Ch. D. 332.*]

THIS was a motion on behalf of the holders of obligations issued by the Florence Land and Public Works Company to restrain the Anglo-Italian Bank from selling the company's property at Florence, of which they were mortgagees.

The company, whose property consisted partly of land and houses at Florence, was registered under the Companies Act, 1862, with an office in London. By the articles of association it was empowered to issue "debenture bonds" and "mortgage bonds."

In 1868 the company, under the powers of the articles, issued obligations in the following form:—

"The Florence Land and Public Works Company, Limited, in consideration of the sum of £100 advanced and lent to them by , do hereby, in pursuance and under the power of their articles of association, bind themselves, their successors, assigns, and all their estate, property, and effects, to pay to the said , or bearer, on presentation of this bond at the registered office of this company in England, the said principal sum of £100 on the 24th day of June, 1875, and also interest on the said principal sum of £100 until paid, at the rate of £6 per cent per annum, at the times and places mentioned in the coupons attached hereto: Provided also, and it is hereby declared, that this bond is issued subject to the condition and scale indorsed hereon."

In March, 1871, the Anglo-Italian Bank, which had an office in London, entered into an agreement with the company to open a credit in the company's favor for £50,000, the amount, together with future advances, to be secured by a mortgage upon the property of the company in and near Florence. This was accordingly executed in the Italian form on the 30th of March, 1871, and registered at Florence, to secure £50,000, and a further sum of £5000.

On the 14th of August, 1877, the company was served in Florence with a citation to appear before the Civil and Correctional Tribunal of Florence, at an audience to be held on the 29th of August, 1877, to hear accorded executive force in the kingdom of Italy to the said mortgage, and to hear authority given to the proper officer for the execution thereof. This citation was issued at the instance of the bank in order to enforce their security, and judgment was obtained thereon giving validity to the deed, and enforcing payment. The bank were about to take steps for the sale of the property.

The plaintiff, a holder of the said obligations, thereupon brought his action, claiming a declaration that the plaintiff and the other debenture holders were mortgagees of the company's property at Florence in priority to the bank.

The plaintiff alleged that the bank had notice of the charge on the property created by the obligations. No evidence was adduced as to the rights of the parties according to the law of Italy.¹

JESSEL, M. R. I am of opinion that the motion fails, and I think it ought to fail on every ground suggested. In the first instance, I assume that the instrument created a charge on property; it would then be a charge on all the property and effects of the company. It appears that the company had houses and land in Florence, which, of course, is out of my jurisdiction, and would be subject to the law of Florence and to Italian law. It also appears that the defendants, the bank, advanced money to the company, and took a mortgage which was registered according to the law of Florence, and as they insist, takes priority over every unregistered charge. That may or may not be so, the Italian law not being proved before me by the plaintiff, and it is for him to show that he has a charge according to the Italian law.

Now he has not proved it, because he has not proved the Italian law; therefore I must for the present purpose assume, as against him, that there is a want of registration, or that otherwise he has no charge. But then he says, Not having a charge according to the Italian law on the houses in Florence, I am still entitled to take them away from those who are entitled to them according to the Italian law, for this reason: I have a contract by the former owner of the houses to convey them to me — I am putting it as strongly as possible in his favor — and the present defendants have obtained a conveyance of the house which was more valid, according to the Italian law, with notice of my prior contract, and I am entitled to enforce that contract not only against the contracting party, but against every person who had notice of that contract.

The answer is very simple. It depends on the law of the country where the immovable property is situated. If the contract according to the law of that country binds the immovable property, as it does in this country, when for value, that may be so, but if it does not bind the immovable property, then it is not so. You cannot by reason of notice to a third person of a contract which does not bind the property thereby bind the property if the law of the country in which the immovable property is situate does not so bind it. That would be an answer to the claim so far as regards the notion that mere notice would do.

But there is another answer to the plaintiff's motion. It seems that these houses being in Florence the bank has taken precedence in the Court of Florence, the proper court having jurisdiction, to establish their title; and the litigation there to which the plaintiffs are or may be parties being in the court of the country having actual jurisdiction over the subject-matter, and having entertained that jurisdiction by a prior litigation, it is contrary to all the rules of the comity of nations that this court should actively interfere between the same litigants. That also appears to me to be an answer to this application.

¹ The statement of facts has been slightly condensed.—Ed.

But there is a third, and, in my opinion, a fatal answer, which is, that if the law of England does apply, still, as I read this document, the plaintiff has no charge on the houses in Florence. That is, supposing it were property in London instead of in Florence, I should hold that the plaintiff had no charge on it whatever.¹

The motion must be refused with costs.²

IN RE FITZGERALD.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1903.

COURT OF APPEAL. 1904.

[*Reported* 1903, 1 *Ch.* 933, 1904, 1 *Ch.* 573.]

By an indenture of settlement dated September 20, 1862, and made between William Robert Seymour Vesey Fitzgerald of the first part, the defendant Sir William Gerald Seymour Vesey Fitzgerald (hereinafter called Sir Gerald Fitzgerald) of the second part, Jane Margaret Matilda Macdonald Lockhart of the third part, and trustees of the fourth part (being a settlement made upon the marriage of Sir Gerald Fitzgerald and Miss Lockhart), W. R. S. V. Fitzgerald covenanted that his heirs, executors, and administrators would, within six months of his death, pay to the trustees the sum of 6000*l.*, to be held by them upon trust for investment as therein mentioned, and to pay the income of the trust fund to Sir Gerald Fitzgerald and his assigns during his life, and after his death to Lady Fitzgerald and her assigns during her life, and after the death of the survivor to stand possessed of the trust fund in trust for the issue of the intended marriage as therein declared. This settlement was in English form, but was executed in Scotland, where the marriage took place. On the same date a marriage contract in Scotch form was executed by Sir Gerald and his then intended wife, whereby, after reciting the English settlement, she assigned and conveyed to the same trustees all and sundry the lands and heritages, goods, gear, debts, and sums of money, and generally her whole property (with certain small exceptions), to the uses and purposes thereafter mentioned, namely, first, for payment of the expenses of executing the trust; secondly, for payment of the free annual proceeds of the trust estate to the said J. M. M. Lockhart during all the days of her life, and that on her own receipt alone, exclusive of the *jus mariti* and right of administration of the said Sir Gerald Fitzgerald; thirdly, in case the said Sir Gerald Fitzgerald should be the survivor of the spouses, for payment of the whole free annual proceeds of the estate to him during all the days of his life after the death of the said J. M. M. Lockhart, declaring that all payments to the said Sir Gerald Fitzgerald should be strictly "alimentary," and should "not be assign-

¹ The remainder of the opinion, in which this point was discussed, is omitted.—*Ed.*

² See *Mercantile I. & G. T. Co. v. River Plate T. L. & A. Co.*, (1892) 2 *Ch.* 303.—*Ed.*

able, nor liable to arrestment, or any other legal diligence at the instance of the creditors."

Shortly after the execution of these instruments the marriage took place. There was only one child of the marriage, the defendant Geraldine Tryphena Margaret Seymour Vesey Fitzgerald, who was born on June 19, 1863.

Between the years 1863 and 1901 numerous deeds were executed in England by Sir Gerald and Lady Fitzgerald, in some of which Miss Fitzgerald joined, creating incumbrances upon their respective interests under the English and Scotch settlements. Subsequently to 1901 Sir Gerald further incumbered his life interest under the settlements. The defendant, Colonel Frederick Henry Harford was the first mortgagee of Sir Gerald's life interest under the Scotch settlement.

Lady Fitzgerald died on May 16, 1901.

This was a summons taken out on October 12, 1901, by the trustees, who were all domiciled in England, asking (inter alia) that it might be determined whether Sir Gerald Fitzgerald was entitled for his life to the income of the trust funds comprised in the Scotch contract of marriage free from incumbrance and without power of alienation, or who was now entitled to the said income.

The trust funds originally comprised in the Scotch contract consisted partly of two bonds of the respective values of 6000*l.* and 7200*l.*, secured upon heritable or immovable property in Scotland. The whole of the 6000*l.* and a portion of the 7200*l.* still remained so invested. By the law of Scotland heritable bonds of this character are real property, except for certain purposes specified in the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 117.

It appeared from an affidavit made by the Lord Advocate of Scotland that by the law of Scotland a person might create a life interest in favor of another, and by declaring it to be "alimentary" might exclude (so far as the life interest did not exceed in amount a reasonable provision) the diligence of ordinary creditors, and restrain all power of anticipation.

It further appeared that by the law of Scotland, if in the case of such an alimentary provision as was in question in the present case, the husband failed to maintain the children of the marriage, they would be entitled to attach the alimentary provision made for him by the contract.

The principal question arising on the summons was whether the Scotch contract must be construed according to the law of Scotland or that of England.

JOYCE, J. (after stating the facts as to the marriage, and referring to the terms of the Scotch contract). Under the provisions of this document, which I may call the Scotch settlement, the trustees have from time to time become entitled to receive and had vested in them various funds comprising (inter alia) Scotch mortgages or heritable bonds and sums of Consols and India stock, but not any Scotch real or im-

movable estate other than mortgages or heritable securities, if they be, as alleged, real estate and to be treated as immovable property.

Lady Fitzgerald, the wife, died in 1901. Sir Gerald having previously, as he has also since that date, and in some cases with the concurrence of his wife, executed in England various assignments of or charges upon his interest under the Scotch settlement, the question has arisen whether the income or alimentary provision to which Sir Gerald Fitzgerald has become entitled under the Scotch settlement is now payable by the trustees to Sir Gerald or to his assigns and incumbrancers. It is contended on behalf of Sir Gerald and the only child of the marriage that, according to the law of Scotland, which it is said governs the case, the effect of the declaration in the Scotch settlement that all payments to Sir Gerald shall be alimentary and not assignable or liable to arrestment, precluded Sir Gerald from assigning or creating any valid incumbrance upon the income to which he would otherwise be now entitled under the trusts of the Scotch settlement.

The domicile of Sir Gerald has remained English all along. His residence is in England. The trustees are all subject to the jurisdiction of the English Court. Indeed, it is they who have invoked its aid in order to determine the question that has been raised. In the existing circumstances, even if the construction and legal effect of this Scotch settlement are to be determined by the law of Scotland — *In re Barnard*, 56 L. T. 9 — it appears to me that its validity and operation with respect to the matter now in question must be determined by the laws of England: *Westlake on International Law*, p. 76; *Vaizey on Settlements*, p. 1640, *et seq.*

Further, if the question were to be considered as one purely of contract between the parties to the Scotch settlement, a contract inconsistent with the law and policy of this country, or, in other words, which conflicts with what are deemed in England to be essential public interests, could not be enforced here: *Westlake on International Law*, 3rd ed. s. 215.

But according to the law of England an inalienable trust cannot be created in favor of a man even for his maintenance. A mere prohibition of alienation cannot be effectually imposed except in the case of a married woman's separate property: *Brandon v. Robinson*, 18 Ves. 429; 11 R.R. 226; *Graves v. Dolphin*, 1 Sim. 66; 27 R.R. 166; *Youngehusband v. Gisborne* (1844), 1 Coll. 400. It is contrary to the policy of the law in this country that property should be so settled as to continue in the enjoyment of a bankrupt notwithstanding bankruptcy. In other words, the declaration in the Scotch settlement that all payments to Sir Gerald shall not be assignable or liable to arrestment at the instance of creditors is void and inoperative according to English law, being repugnant and contrary to public policy.

It can hardly be doubted that, so far as relates to the pure personalty or movable property comprised in the Scotch settlement, the law of England must govern the case. And upon consideration, having regard to

the frame of the settlement, I think there is no difference with respect to such part, if any, of the funds or securities comprised in the settlement as ought, according to the law of Scotland, to be treated and considered as real or immovable property. What Sir Gerald has is a personal claim against the trustees for payment of the residue of the income derived from the several investments for the time being subject to the Scotch settlement, after payment thereof of all the expenses of executing the trusts. I think that the decision of the House of Lords in *Scott v. Allnutt*, 2 Dow & Cl. 404, cited in Story on the Conflict of Laws, applies. See also per Lord Nottingham in *Noell v. Robinson* (1681), 2 Vent. 358. It is unnecessary, therefore, to consider whether, even if this were not so, the income as soon as it came to the hands of Sir Gerald would not be bound in equity by the assignments he has made, so as to render him liable to be restrained by injunction from disposing of such income otherwise than by payment to his assignees. It is also, I think, unnecessary to consider whether, if it could be shown that as to any part of the property comprised in the Scotch settlement (*e. g.*, the portion consisting, or that did consist, of heritable bonds or Scotch mortgages) the law applicable was *prima facie* that of Scotland, such law ought not to be enforced in the courts of this country, upon the ground that it would result in injustice to English creditors or incumbrancers.

Upon the whole, I am of opinion that in the circumstances of the present case Sir Gerald Fitzgerald is not entitled to require payment to himself of the income of the trust funds as being free from incumbrances or without power of anticipation, but that his assignees or incumbrancers are the persons entitled to receive payment from the trustees of the Scotch settlement.

Sir Gerald appealed.

COZENS-HARDY, L.J. The first question for consideration on this appeal is whether what I may shortly describe as the Scotch settlement is subject to the law of Scotland, or whether it must be governed by English law. Now this Scotch settlement dealt with the property of a domiciled Scotch lady, who was about to marry a domiciled Englishman, and there is no doubt but the "matrimonial domicile" was English. It is not suggested that a permanent residence in Scotland after the marriage was contemplated. As a general rule the law of the matrimonial domicile is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express stipulation that some other law shall apply. See *Van Grutten v. Digby* (1862), 31 Beav. 561, in which case the matrimonial domicile was French, but the contract, though made in France and void by French law, was nevertheless treated by Sir John Romilly as valid so far as it related to property within the jurisdiction. See also *Viditz v. O'Hagan* (1899), 2 Ch. 569. The decision in that case was reversed by the Court of Appeal, but not on the ground in any way

affecting this point. It is not necessary that there should be an express stipulation. It is sufficient if the court arrives at the conclusion that the parties in fact contracted with reference to some law other than that of the matrimonial domicile.

Applying these principles to the Scotch settlement, I find several important indications. (a) The great bulk of the property, namely, 13,200*l.*, was invested in heritable bonds. It has been settled by a chain of authorities, which ought not now to be reviewed by us, namely, by Grant M.R., in *Johnstone v. Baker*, 4 Madd. 474, n., by Leach M.R. in *Jerningham v. Herbert*, 4 Russ. 388; 28 R. R. 136, and by Wigram V.-C. in *Allen v. Anderson* (1846), 5 Hare, 163, that heritable bonds must be regarded in our courts as immovables. If so, it can scarcely be denied that the *lex loci* — *i. e.*, the law of Scotland — must apply to the extent of the 13,200*l.* I am aware that there has been a change of investment of part of this sum into English securities, but this change cannot alter the law applicable to the settlement. I may add that, as to the 13,200*l.*, the matter does not rest in contract. There is an actual completed assignment of the heritable bonds. (b) There was, however, 500*l.* cash belonging to the lady, which was paid over to the trustees for investment, and which was, in fact, invested in Consols, although it might have been invested in heritable securities in Scotland. It seems to me that this sum cannot fairly be treated as intended to be subject to a different law from that which is applicable to the bulk of the property. (c) The whole frame of the settlement is in Scotch form, and the limitations are of such a nature that they can only take effect if Scotch law is to be applied. I therefore feel bound to treat this as a settlement made in Scotland by a domiciled Scotch lady of Scotch property, in Scotch form, and subject to Scotch law. The trustees of this Scotch settlement must in Scotland follow the Scotch law, and their residence in England, or their English domicile, is irrelevant. This being so, it follows, in my opinion, that we are bound to hold that Sir Gerald Fitzgerald takes such interest, and such interest only, as the courts in Scotland would declare him entitled to: *Ansthruther v. Adair*, 2 My. & K. 513; 39 R. R. 263. There ought to be no difference in a matter of this kind between the Court of Sessions and the High Court. The nature and extent of his interest cannot depend upon his domicile, although his capacity to deal with his interest may perhaps depend upon his domicile. To take the somewhat analogous case of a life interest in English property given by the will of a domiciled Englishman for the separate use of a married woman, without power of anticipation, it has never, so far as I am aware, been suggested that the nature and extent of her interest varied according as her domicile was, or was not, English. The trust would be regarded in our courts as valid and operative, even though by the law of her domicile neither the separate use nor the restraint upon anticipation was recognized. And, on general principles, the same view ought to be adopted by the courts of the country in which the married woman was domiciled. In short, by

the law of England, it is the Scotch law which must be applied to this Scotch settlement.

It is, however, strongly urged that a strictly alimentary provision for an adult male is not only unknown to and inconsistent with the provisions of English law, as in general it undoubtedly is, but that it is contrary to public policy, and ought therefore to be wholly disregarded in an English court. I cannot adopt this argument. There is nothing immoral in such a provision. Indeed, there are many instances in which pensions or retiring allowances are by statute made not transferable, or liable to be attached by any legal process. I may refer to the pension allowed to a retiring clergyman under the Incumbents' Resignation Act, 1871, and to the observations of the Court of Appeal on that statute in *Gathercole v. Smith* (1881), 17 Ch. D. 1. Moreover, it has been long settled that at common law, and apart from any statutory enactments prohibiting assignment, certain salaries or pensions are inalienable. For example, the half-pay of an officer. In *Flarty v. Odum* (1790), 3 P. R. 681, 682; 1 R. R. 791, Lord Kenyon said: "I am clearly of opinion that this half-pay could not be legally assigned by the defendant. . . . Emoluments of this sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. . . . It might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned." In the following year the same question came up for consideration in *Lidderdale v. Duke of Montrose* (1791), 4 T. R. 248, 250; 2 R. R. 375. This was an action by an officer on half-pay against the Paymasters-General of the army to recover arrears of his half-pay, and the only question was whether an assignment by way of mortgage, of which the defendants had due notice, justified them in withholding the money from the plaintiff. The Court was clearly of opinion that, "on principles of public policy, as well as on account of the interest of the officers themselves, by law such assignments were void." The mortgagee was not party to this action, but it seems to have been thought that he might obtain equitable relief, and he accordingly filed a bill in the Exchequer: see *Stone v. Lidderdale* (1795), 2 Anstr. 533; 3 R. R. 622. It was argued that the assignment was good in equity, as a transfer of any valuable contingency or possibility, if made for good consideration, is affirmed in equity. But MACDONALD, C.B., in a considered judgment, declined to accept this view, and held that the plaintiff was not entitled to any relief in equity in respect of the mortgage. In short, he declined to affect the conscience of the mortgagor in respect of future instalments of the half-pay.

In my opinion it is impossible to disregard this "alimentary provision" on the ground of public policy. The Scotch court would de-

clare that the interest given to Sir Gerald cannot be assigned, and would disregard the claims of his specific mortgagees, and it is our duty to follow and adopt the Scotch law: *Anstruther v. Adair*, 2 My. & K. 513; 39 R. R. 263.

But then it was urged that Sir Gerald could bind, and did bind, the income, as and when it reaches the hands of the trustees in England, and that, whatever might be the rights of his alimentary creditors, he himself ought not to be allowed to claim from the trustees the income which he has, by a contract binding on his conscience, charged in favor of his mortgagees. I doubt whether this doctrine, which is explained and illustrated by Lord Macnaghten in *Tailby v. Official Receiver* (1888), 13 App. Cas. 523, 543, has any application to a vested life interest, the assignment of which takes effect, if at all, for reasons wholly independent of conscience. An assignment of a vested equitable interest is complete and operative, though voluntary. It in no way depends upon contract, or upon anything further to be done by the assignor. The doctrine applies only where there is no present property capable of assignment, such as possibilities and expectancies. *Stone v. Lidderdale* 2 Anstr. 533; 3 R. R. 622, is an authority against the respondent's contention, and I know of no authority in its favor. I may observe that the defendant Lidderdale was a domiciled Englishman, whose general capacity to contract was undoubted. Moreover, this contention is really only another way of presenting the argument that we ought to disregard the Scotch law. If the life interest is capable of assignment, the Court would grant specific performance of the contract, and would aid the mortgagees by granting an injunction. If, however, as in *Stone v. Lidderdale*, the interest is non-assignable, I think it follows that no effect can be given to a deed purporting to assign by way of anticipation. The decision of the House of Lords in *Scott v. Allnutt*, 2 Dow & C. 404, which was relied upon, does not really touch the case.

In my opinion, the order of JOYCE, J., was wrong, in so far as it declared that the whole of the income during the life of Sir Gerald is payable to his assignees or incumbrancers, according to their respective priorities. If the amount of the income were very large, any excess beyond a reasonable amount would, according to the Scotch law, pass to the assignees or incumbrancers, but I do not understand that it is suggested that there is any excess in the present case. I think the declaration should be to the effect that Sir Gerald is entitled to the whole income during his life, free from the claim of any assignees or incumbrancers, but without prejudice to the rights (if any) of his alimentary creditors, or of Miss Fitzgerald, and without prejudice to any prior payment in respect of the policy, which is the subject of another appeal by Miss Fitzgerald.¹

¹ VAUGHAN WILLIAMS, L. J., delivered a concurring opinion; STIRLING, L. J., dissented.

A
SELECTION OF CASES
ON
THE CONFLICT OF LAWS

BY
JOSEPH HENRY BEALE, JR.
PROFESSOR OF LAW IN HARVARD UNIVERSITY; PROFESSOR OF LAW
IN THE UNIVERSITY OF CHICAGO

VOL. III.
THE RECOGNITION AND ENFORCEMENT
OF RIGHTS

WITH A SUMMARY OF THE CONFLICT OF LAWS

CAMBRIDGE
HARVARD UNIVERSITY PRESS

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University Press :
JOHN WILSON AND SON, CAMBRIDGE, U.S.A.

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CASES ON THE CONFLICT OF LAWS.

PART IV.

THE RECOGNITION AND ENFORCEMENT OF RIGHTS.

CHAPTER XI.

PERSONAL RELATIONS.

SECTION I.

CAPACITY.

SOMERSET *v.* STEWART.

KING'S BENCH. 1772.

[*Reported Loft, 1.*]

ON return to an *habeas corpus*, requiring Captain Knowles to show cause for the seizure and detainure of the complainant Somerset, a negro, the case appeared to be this: that the negro had been a slave to Mr. Stewart, in Virginia; had been purchased from the African coast, in the course of the slave trade, as tolerated in the plantation; that he had been brought over to England by his master, who, intending to return, by force sent him on board of Captain Knowles's vessel, lying in the river; and was there, by the order of his master, in the custody of Captain Knowles, detained against his consent, until returned in obedience to the writ. And under this order and the facts stated, Captain Knowles relied in his justification.¹

¹ The arguments of Mr. Hargrave and Mr. Alleyne for the negro, and of Mr. Wallace and Sarjeant Davy for the defendant, are omitted; they will be found at length in 21 Howell's State Trials, 1. In the course of the argument, "the court approved Mr. Alleyne's opinion of the distinction how far municipal laws were to be regarded; instanced the right of marriage, which, properly solemnized, was in all places the same, but the regulations of power over children from it, and other circumstances, very various." At the end of the arguments, Lord MANSFIELD said: "The now question is, whether any dominion, authority, or coercion can be exercised in this country on a slave according to the American laws? The difficulty of adopting the relation without adopting it in all its consequences is indeed extreme; and yet many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate." — ED.

LORD MANSFIELD, C. J.¹ We pay all due attention to the opinion of Sir Philip Yorke and Lord Chief Justice Talbot, whereby they pledged themselves to the British planters for all the legal consequences of slaves coming over to this kingdom or being baptized: recognized by Lord Hardwick, sitting as Chancellor, on the 19th of October, 1749, that trover would lie; that a notion had prevailed, if a negro came over or became a Christian, he was emancipated, but no ground in law; that he and Lord Talbot, when attorney and solicitor-general, were of opinion that no such claim for freedom was valid; that though the statute of tenures had abolished villains regardant to a manor, yet he did not conceive but that a man might still become a villain in gross, by confessing himself such in open court. We are so well agreed that we think there is no occasion of having it argued (as I intimated an intention at first) before all the judges, as is usual, for obvious reasons, on a return to a *habeas corpus*. The only question before us is, whether the cause on the return is sufficient; if it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states that the slave departed and refused to serve; whereupon he was kept to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different in different countries. The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created is erased from memory. It's so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

POLYDORE v. PRINCE.

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MAINE. 1837.

[Reported *Ware*, 402.]

THIS was a libel for an assault and battery committed by the master on a passenger, on a voyage from Guadaloupe to Portland. It appeared from the evidence that the libellant was a slave in Guadaloupe.²

WARE, District Judge. . . . It is alleged in the answer as a substantive ground of defence, and the fact is admitted on the other side that the libellant, in his own country, is a slave, and as such, incapable of appearing as a party in any court of justice; and it is contended that

¹ LORD MANSFIELD first recited the return to the writ. — ED.

² The remainder of the statement of facts and part of the opinion are omitted. — ED.

this personal incapacity upon the received principles of the *jus gentium*, or at least on the principles of national comity, follows him into whatever country he may voluntarily go, or be carried by his master. The argument is, that the institution of personal servitude, however contrary it may be to natural right, is an institution admitted and acknowledged by the law of nations; that every nation having the exclusive right to regulate its own internal polity, and to determine the personal estate or capacity of its members, all other nations are bound by the *jus gentium*, or by national comity, to take notice of, and recognize this personal status as it would be recognized in the forum of their original domicil, while they remain members of that community; that personal qualities impressed upon them by the law of their original domicil as to their civil capacities, or incapacities, travel with them wherever they go, until their legal connection with that country is dissolved. . . .

The general doctrine of foreign jurists seems to be, that the state of the person, that is, his legal capacity to do, or not to do, certain acts is to be determined by the law of his domicil. . . . If this general principle is to be received without qualification, it would seem to decide the present case at once, for it is admitted that in Guadeloupe where the libellant has his domicil, he can maintain no action in a court of justice. But though the principle is stated in these broad and general terms, yet when it is brought to a practical application in its various modifications, in the actual business of life, it is found to be qualified by so many exceptions and limitations, that the principle itself is stripped of a great part of its imposing authority. No nation, it is believed, ever gave it effect in its practical jurisprudence, in its whole extent. Among these personal statutes for which this ubiquity is claimed are those which formerly over the whole of Europe, and still over a large part of it, divide the people into different castes; as nobles and plebeians, clergy and laity. The favored classes were entitled to many privileges and immunities, particularly beneficial and honorable to themselves. It cannot be supposed that these immunities would be allowed in a country which admitted no such distinctions in its domestic policy. If a bill in equity were filed in one of our courts against an English nobleman, temporarily resident here, would he be allowed to put in an answer upon his honor, and not under oath, because he was entitled to that personal privilege in the forum of his domicil? I apprehend not. In like manner the disqualification and incapacities by which persons may be affected by the municipal institutions of their own country, will not be recognized against them in countries by whose laws no such disqualifications are acknowledged. In England a person who has incurred the penalties of a premunire or has suffered the process of outlawry against him can maintain no action for the recovery of a debt, or the redress of a personal wrong. But would it be contended that because he could not maintain an action in the forum of his domicil, that he could have no remedy on a

contract entered into, or a tort done to him within our jurisdiction? The reasons upon which an action is denied him in the forum of his domicile are peculiar to that country, and have no application within another jurisdiction. The incapacity is created for causes that relate entirely to the domestic and internal polity of that country. As soon as he has passed beyond its territorial limits, the reason of his incapacity ceases to operate, and in justice the incapacity should cease also.

Every nation has a perfect right to establish for itself, its own forms of internal polity, and to determine the state and condition, the civil capacities and incapacities of its own members. Besides these personal laws determining the state and condition of individuals which are founded on natural relations and qualities, and such as are universally recognized among civilized communities; as those of parent and child, those resulting from marriage, from intellectual imbecility and the like, they may, and in point of fact, do establish distinctions, which are not founded in nature, but relate only to the peculiarities of their own social organization, to their own municipal laws, and to the artificial forms of society, which are established among themselves. Now it is freely admitted that other nations are bound by the *jus gentium* to admit the validity of all those personal statutes of other communities establishing such distinctions among their members, whether natural or artificial, to a certain extent. Their validity will be admitted, and they will be enforced by the tribunals of other countries, as to acts which are done, and rights which are acquired within the territorial limits of the community where these laws are established. There they have a legal, and other nations are bound to admit, certainly as a general rule, a rightful authority.

But it is by no means so clear that those personal distinctions which are not founded in nature, and are the result of mere civil institutions, can be allowed to accompany them, and give them personal immunities, or affect them with personal incapacities in other countries in which they may be temporarily resident or transiently passing, whose laws acknowledge no such distinction. The law of the place where a person is for the time being, as to acts done, or rights acquired within that jurisdiction, it would seem, ought to prevail so far as his civil rights depend on his personal status. For these personal statutes establishing distinctions between individuals as to their civil qualities, have a direct relation to public order, and, as is remarked by one of the most eminent living jurists in continental Europe: "Every person who establishes his dwelling in a country, or, it may be added, who is transiently within it, is bound to conform to the measures which the local law prescribes, in the interest of public decorum and good morals." Merlin, Rep. Jur., Effet Retroactif, sect. 3, § 2, art. 5. The observation is applied to the case of a married woman. If by the law of her domicile she is authorized to make valid contracts, and to maintain an action in a court of justice in her own name without the authorization of her husband, and she removes to a country by whose laws this

power is denied to married women, she will not carry with her, into her new residence, the capacity to contract, to plead, and to be impleaded in a court of justice as she is allowed by the law of her domicile, this capacity being denied by the local law, as offensive to good manners. If a person happens to transfer his residence to a country where the same personal distinctions are established, as are allowed in his own domestic forum, it is not intended to be denied, but that the tribunals of this country may allow him his personal immunities or affect him with the personal incapacity of his domicile; but it will, I apprehend, be according to the local law, and not according to the law of his domicile. If a Turkish or Hindoo husband were travelling in this country with his wife, or temporarily resident here, we should, without hesitation, acknowledge the relation of husband and wife between them; but the legal pre-eminence of the husband as to acts done here, would be admitted only to the extent that the marital rights are recognized by our laws, and not as they are recognized by the law of his domicile. If a Roman father, or a father from any country which had adopted the Roman law of paternal power, were travelling in this country with a minor child, we should acknowledge the relation of parent and child, but we should admit, I presume, as a general rule, the exercise of the paternal power no further than as it is authorized by our own law. If a foreigner, in whose country slavery is established, were temporarily resident in Virginia, where slavery also exists, and had brought with him a slave as a servant, a court sitting in Virginia might, I suppose, recognize the relation of master and slave, because that is a relation known to the local law, but it would limit the exercise of the master's authority over his slave, by their own law, and not by the law of the master's domicile.

It is among the first maxims of the *jus gentium* that the legislative power of every nation is confined to its own territorial limits. This is a principle which results directly and necessarily from the independence of nations. Whatever may be the nature of the law, whether it relates purely to persons and their civil qualities, or to things, it can, *proprio vigore*, have no force within the territorial limits of another nation. It follows that the peculiar personal status, as to his capacities or incapacities, which an individual derives from the law of his domicile, and which are imparted only by that law, is suspended when he gets beyond the sphere in which that law is in force. And when he passes into another jurisdiction his personal status becomes immediately affected by a new law, and he has those personal capacities only which the local law allows. The civil capacities and incapacities with which he is affected by the law of his domicile, cannot avail either for his benefit or to his prejudice, any further than as they are coincident with those recognized by the local law, or as that community may, on principles of national comity, choose to adopt the foreign law. Though the civilians, as has been observed, generally hold that the law of the domicile should govern as to the personal status, it is by no means true that they are univer-

sally agreed. Voet, one of the most eminent, of whom it has been said that by his clearness and logic he merits the title of the geometer of jurisprudence, Merlin, Quest. Droit, Confession, sect. 2, note 1, after stating that such is the opinion of the majority, *plurimum opinio*, gives his own opinion in decisive terms, that personal statutes, as well as those relating to things, are limited in their operation to the country by which they are established; and he supports his opinion by the authority of the Roman law, as well as by that plain and obvious axiom of the *jus gentium*, that the legislative power of every government is confined to its own territorial limits. Ad Pand., l. 1, tit. 4, Part 2, n. 5, 7, 8. Gail, who has been styled the Papinian of Germany, maintains the same opinion in terms equally positive. Pract. Obs., l. 8, obs. 122, n. 11.

The inconveniences which would result from a practical adoption of the principle that the law of the domicile must prevail, which determines the personal status of the individual, wherever he may be, would be found to be very great. If we admit that a foreigner has all those personal capacities and civil qualities in this country which the law of his domicile allows, to be consistent and follow out the principle we must adopt all those subsidiary laws of his domicile which regulate and protect him in the enjoyment of his personal status. If, for example, we acknowledge the relation of master and slave, our law should, in consistency, arm the master with the authority to govern his slave, with the power of disposing of his person and labor, which he enjoys by the law of his own country. It would be a mockery to acknowledge the relation of master and slave and to deny all the legal consequences which that relation imports. If we adopt the artificial distinctions of other nations with regard to their subjects, when they are temporarily resident among us, it would seem that we must also adopt that part of their laws which regulates those artificial relations, and the rights and duties which result from them. Natural relations of foreigners, and such as are established by our own domestic institutions, we recognize in foreigners who are temporarily resident among us; but the rights and obligations which flow from them must, as a general rule at least, be determined by our own law, and be enforced by such means only as the local law allows. But those merely artificial distinctions, those capacities and disqualifications of mere positive institution, established by different communities among their members, which are not founded in nature but which relate to their own domestic economy, their municipal institutions, and their peculiar social organization, cannot be admitted to follow them into other nations in whose laws such distinctions are unknown, without disturbing the whole order of society, and introducing into communities privileged castes of persons, each governed to a considerable extent by different laws and affected by personal privileges peculiar to themselves, and totally at variance with the habits, social order, and the laws of the community among whom they reside.

I have thus far considered the subject as it was presented in one branch of the argument, as purely a question of the *jus gentium*, to which the same considerations will apply whether it be raised in one country or another, and I come to the conclusion that the libellant is not disqualified from maintaining an action for a personal tort committed within our jurisdiction, merely because he is by the laws of his own country rendered incapable of maintaining an action in the forum of his domicile. And that conclusion will be fortified by recurring to our own domestic jurisprudence. . . .

The clearest and most distinct recognition of the principle that the civil capacities and incapacities of an individual are to be determined by the law of the place where the person is, and not by that of his domicile, is found in the decisions upon the very subject which is involved in this case — that of slavery. . . . All these cases stand upon the principle that slavery, and with it as a necessary consequence, all the civil incapacities which are peculiar to that servile state, depend entirely on the local law. It follows of course that when a slave passes into a country, by whose laws slavery is not recognized, his civil condition is changed from a state of servitude to that of freedom, and he becomes invested with those civil capacities which the law of the place imparts to all who stand in the same category. It is indeed said, by Chief Justice Shaw, in delivering the opinion of the court, in the case of the Slave Med (*C. v. Aves*, 18 Pick. 193), that “slaves in such case become free, not so much because any alteration is made in their status or condition, as because there is no law which will warrant, but there are laws, if they choose to avail themselves of them, which prohibit their forcible detention, or forcible removal.” If by this is meant there is no change in the personal state of a slave in relation to the law of the country he has left, it may well be admitted to be correct. The law of that country, notwithstanding he is for the time withdrawn from its direct and immediate control, would hold him to be a slave until he acquired his freedom in some of the forms of emancipation known to that law. His mere transit into a country whose law declared him free, within its jurisdictional limits, would not *per se* liberate him from the incapacities and obligations resulting from the law of his domicile within the legitimate sphere of that law’s operation, and if he were to return to that country the condition of servitude would reattach to him precisely as when he left it. So it was decided by Lord Stowell, in the case of the Slave Grace, 2 Hagg. Adm. 94, and the same principle is distinctly established by the case of *Williams v. Brown*, 3 B. & P. 69. But it by no means follows that because the law of his domicile holds him to be a slave, he has not, while within a jurisdiction which declares him to be free, all the faculties which belong to a state of freedom. It is difficult to understand what the law does, by declaring him free, if it does not invest him with the rights and capacities of a free man; and if it does, it confers upon him a personal state, very different from that of slavery; and there is no absurdity or contradiction in sup-

posing a man to be a free man in one country and a slave in another. Both result from the same principle; the absolute supremacy of the laws of every state within its own territorial limits. And though Lord Stowell rather sarcastically remarks, that the law of England, by adopting this principle, puts the liberty of a man, as it were, into a parenthesis, it is nothing different from what occurs in many other cases, in which an individual is affected by the law of his domicil with peculiar capacities and disqualifications, which are not recognized either in his favor or against him while resident within another jurisdiction. When he returns to his own country he becomes reinvested with his original personal status and the capacities and disqualifications of the law of his domicil attach. Take a case of familiar and daily occurrence. A man is a magistrate in the place of his domicil. He passes out of that jurisdiction, and he can exercise no authority as a magistrate. He becomes a private person, but on his return to the place of his domicil he reassumes his personal status as a magistrate.

The law which declares a slave free on his introduction into this country, by necessary consequences, if it be not an identical proposition, declares him to be possessed of the civil qualities of a freeman, and confers on him the faculty of vindicating his rights, and claiming redress for wrongs in the ordinary course of justice; and this general proposition is an answer to another part of the argument, that the libellant in this case was put under the government of the respondent who stood *loco domini*, the owner having delegated to him his authority. That authority when the slave was within the jurisdiction of this country, could be exercised only under the restrictions of our law. Years before the decision of *Somerset's* case, it was said by Lord Chancellor Northington, that a negro might maintain an action in England, against his master for ill usage. *Shanley v. Harvey*, 2 Eden, 126, quoted; 2 Hagg. Adm. 116.

It was supposed in the argument that a distinction might be made, founded on the circumstance that the tort was committed on the high seas, which are within the common jurisdiction of all nations. It is true that no nation can claim an exclusive jurisdiction over any part of the high seas, but all nations can, and do claim an exclusive jurisdiction over their own vessels that float on the high seas. A foreigner who is a passenger on board an American vessel, when the vessel has left the port, and is beyond the jurisdiction of his own country, is amenable to the laws of this country and is under their protection. If he commits a crime he may be indicted in our courts, and punished by our laws. If he commits a tort, he is personally liable to answer for it in our courts, and if he suffers a wrong he may appeal to the laws of this country for redress, as much as though the wrong had been done him on land. If the libellant would not be precluded from maintaining an action for a tort done on land, he may equally maintain one for a tort done in an American vessel on the high seas. *Forbes v. Cochrane*, 2 B. & C. 448.

It was supposed at the argument that the capacity of the libellant to maintain this action in the courts of the United States may stand on grounds somewhat different from what it would in the State courts; that slavery existing in some of the individual States and not being prohibited by the constitution and laws of the United States, the national courts might be bound by the principles of the *jus gentium* to recognize the incapacities of slaves having a foreign domicil, even when it would not be done by the State courts, and that the national tribunals are under the same obligations in this respect, whether sitting in a State where slavery is admitted, or where it is prohibited. If this were conceded, and in the view which I take of the case I do not think it necessary to give an opinion upon the question, the answer is, that a court sitting in Louisiana is no more bound than one sitting in Maine, to recognize as to any acts, or rights acquired, within the exclusive jurisdiction of the United States, the artificial incapacities of persons resulting from a foreign law. The question in both cases would be, whether the party could, by the laws of the United States, have a standing in court. The court certainly is not bound to enforce against him a personal incapacity derived from the law of his domicil, because that law can have no force in this country any further than our law on the principles of comity chooses to adopt it; and every nation will judge for itself how far it is consistent with its own interest and policy to extend its comity in this respect. If the legislative power has prescribed no rule, the courts must of necessity decide in such individual case as it is presented, and however embarrassing and perplexing the case may sometimes be, the courts cannot escape them. If the incapacity alleged were slavery, it is not for me to say what would be the judgment of a court sitting within a jurisdiction where slavery is allowed, but sitting as this court does, in a place where slavery by the local law is prohibited, I do not feel myself called upon to allow that disqualification when it is alleged by a wrong-doer, as attaching to the libellant by the laws of a foreign power, for the purpose of withdrawing himself from responsibility for his own wrong.

COMMONWEALTH v. GREEN.¹

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[Reported 17 *Massachusetts*, 515.]

PARKER, C. J.¹ The prisoner, having been convicted, by the verdict of a jury, of the crime of murder, at the last term of the court, moved for a new trial; because, as alleged in his motion, one Sylvester Stoddard, who had been sworn as a witness on the part of government, and who had testified to the jury, had been convicted of the crime of

¹ Part of the opinion is omitted. — Ed.

larceny, in a court having jurisdiction of the offence, within the State of New York ; whereby, as is alleged, he was rendered infamous, and for that reason his testimony could not be received in a court of justice in this Commonwealth. . . .

If New York is to be considered on the footing of a foreign State, the difficulty of giving such effect to a conviction seems insuperable. The objection to the witness on account of infamy must be supported by a record of the judgment. What is a record of a foreign State, and how it shall be authenticated, are questions of delicacy and difficulty, which it would be almost impossible to settle in the course of a trial, which must always proceed with as little interruption and delay as possible. Whether the facts, which would be here deemed an infamous crime, are the same which constitute the like offence in the country from which the record comes, the court would have no means of knowing with certainty. The crime of treason is known to be different in different countries ; what is felony, also, in one country may not be felony in another ; and it is competent to the legislature of every nation to attach disabilities to the commission of offences which, by the laws of other nations, may be wholly without such consequences.

Thus one State may enact that the detention of another's property after demand by the owner, shall be deemed and taken to be larceny, and punished as such ; and that a general description of the offence, in the indictment, should be sufficient ; so that a foreign court could never know, by inspection of a copy of a record, what were the ingredients of the crime which had been punished.

So, also, the non-payment of a debt may be branded with infamy by the laws of any country, and designated by some term usually denoting the *crimen falsi* ; and this class of crimes may be enlarged so as to comprehend transactions which in other countries are considered venial, or at least not criminal.

If the common law were unchangeable, the courts of countries which adopt it as part of their code might know with certainty the nature and character of crimes ; but while every country has its legislature, which has a right to alter or repeal the common law, such certainty cannot be attained. Treason, by the common law, renders the convict infamous ; but many acts are made treason by positive enactments in one country, which would not be so in another. The infamy, therefore, consequent upon treason, ought not to pass beyond the country in which the crime is committed.

Another objection to receiving such evidence for such a purpose is, that a person, who may have left his native country convicted of crime, however long he may have lived in his adopted country, and whatever reputation he may have acquired by a course of upright and honorable conduct, has no means of being restored to credit. For the pardoning power of the country where he resides cannot reach an offence committed without its jurisdiction. And thus it may happen that a naturalized citizen, who, by his virtue and talents, and a long course of

irreproachable conduct, may have obtained the confidence of his fellow-citizens, and even their suffrages for the most important offices, may be met in a court of justice by some obsolete record of a conviction of some crime, perhaps merely political, which may be deemed infamous in the country from which he came ; and can have no power of effacing the stain, without soliciting a pardon where he may be wholly forgotten, and where there can be no evidence of such a change of life and manners as would entitle him to the clemency of the offended power.

It is these difficulties, with others which might be mentioned, which justify the principle that appears to be adopted by the English courts ; and which we are disposed to think is a maxim of general law, recognized by all nations, viz. that the penal laws of a country do not reach, in their effects, beyond the jurisdiction where they are established. It is so laid down by an eminent judge in the case of *Folliott v. Ogden*, 1 H. Black. 131, and in a treatise of public law by Martens, the same principle is advanced in more extensive and unlimited terms. In the 24th section of his work he says, "The criminal power being confined to the territory, no act of its authority can be exercised in foreign countries without violating their rights." In the 25th section he says, "By the same principles a sentence, which attacks the *honor, rights*, or property of a criminal, cannot extend beyond the limits of the territory of the sovereign who pronounced it. So that he who has been declared infamous in one country is infamous in a foreign country *in fact*, but not in *law* ;" which terms the author probably uses in allusion to the civil law, resembling, in some degree, our distinction between competency and credibility. By *infamia juris* is meant infamy established by law as the consequence of crime ; *infamia facti* is where the party is supposed to be guilty of such crime, but it has not been judicially proved. "And the confiscation of his property cannot affect his property situated in a foreign country. To deprive him of his honor and property judicially there also, would be to punish him a second time for the offence." To refuse a man the right to be a witness on account of a conviction in another country, would be to suffer that conviction to have force here, and, in some measure, to carry it into execution.

If it be said that it will be dangerous to the lives and reputations of the citizens, that foreigners, who have been rendered infamous abroad, should be admitted to testify against them, the answer is, that their former condition and character may be made known to the jury to enable them to judge of their credibility ; and this without depriving them of any valuable personal right by reason of their conviction abroad. Their right to stand in court as *probi et legales homines* is sustained ; but as all other men, the value of the testimony is to be estimated by their general reputation, and even by the proof of particular facts showing a conviction and punishment for crime ; and the effect of such proof may be always rebutted by evidence of good conduct, a virtuous life, etc.

Infamy is, in truth, part of the punishment of the *crimen falsi*,

although not expressed in the sentence; and it creates a disability to testify, just as excommunication in a spiritual court does to sue in the courts of common law. To hold a person incompetent on account of such a conviction, is to give effect to the conviction, and to enforce the punishment; and thus the penal laws of one country would reach into others, contrary to the principle above stated.

It would seem to be consistent with sound principles also that, wherever there is a crime or punishment remaining in force, there should be a power of pardon; but the act of pardon cannot operate upon an offence committed under another jurisdiction; nor can it extend beyond the jurisdiction of the offended sovereign. So that one who has once exposed himself to a punishment which renders him infamous in the country where the offence was committed, must be perpetually stigmatized if he remove into another country. This is sufficient to show the reasonableness of limiting the penal effects of crime to the country whose laws have been violated.

We do not find, after a careful examination, as well by the counsel for the prisoners, as by ourselves, that the question before us has arisen in the English courts, or in those of any of the United States. All the cases in the English books in which objections were made to the competency of witnesses on the ground of infamy, seem very clearly to have been cases of conviction in some of their own courts. Indeed the strictness of the rule under which such evidence is admitted, seems almost necessarily to exclude conviction in any foreign court. The objector must have the record in his hands, and must show not only a conviction, but a judgment thereon. We think the silence of the English books on this subject, even among the multitude of treatises on evidence, which have lately issued from the press, furnishes strong reasons to believe that objections of this nature, if heard at all, only go to the credibility of witnesses.

The only book we have seen which intimates a different doctrine is one upon the principles of evidence, by a Mr. Glassford of Scotland, referred to in the argument for the prisoner; a respectable writer, but hitherto unknown to the courts of law in this country. Speaking of incompetency by reason of infamy, he inquires into the proof necessary to establish the fact; and supposes that an exemplification of a record, from England or Ireland, would be received as proof in Scotland. How far the peculiar organization of the Scotch courts, and the system of rules by which they are governed, may have had an effect on their law of evidence, we cannot know; nor whether the circumstance, that the three countries are under one sovereign, and one legislative power, may not have had its effects. The examples produced by the writer are from England and Ireland only; and from this it would seem that his doctrine would not apply to the records of a country strictly foreign. Indeed such records cannot properly be exemplified; but must be proved by testimony, as other facts are proved.

But it has been argued by the counsel for the prisoner, that, although

a conviction in a court of a country strictly foreign, should not be held to take away the competency of a witness, yet that such is the relation of the several States which compose the American Union with each other, that the same law ought not to prevail here, as the States are not in fact foreign to each other. . . .

We have come to the opinion that there is no difference in the effect of a conviction, in regard to the competency of a witness, between any State in this Union and any foreign State; and that in neither case is the witness to be excluded on account of such conviction.¹

Lawt
KYNNNAIRD v. LESLIE. *V*

COMMON PLEAS. 1866.

[*Reported Law Reports, 1 Common Pleas, 389.*]

THIS was an action of ejectment brought to try the right to certain estates in Northumberland. The case was tried before ERLE, C. J., at the sittings in Middlesex, after last Trinity Term, when it appeared that the estates in question had been granted by the Crown to Anthony James, Earl of Newburgh, in 1798. He died in 1814, and by his will devised the estates to his wife for life, with remainder, after several intermediate estates, which did not take effect, to his own right heirs. At his death, his heir, unless prevented from taking by the attainder of Charles Ratelyffe, the testator's grandfather, who was attainted of treason in 1716, and whose marriage took place abroad subsequently to that event, was admitted to have been Francis Eyre, the younger.

ERLE, C. J.² I am of opinion that the defendant is entitled to our judgment. The action is one of ejectment, and the plaintiff must make out his own title in order to succeed: it is not, however, necessary to go into that title here further than to say that it is admitted that Francis Eyre, the younger, through whom the defendant claims, became entitled to the property on the death of the testator, unless his title was defeated by his having to claim through a common ancestor who was attainted before his marriage, or unless the marriage of that common ancestor was void. . . . Was the marriage of Charles Ratelyffe null? I can find no authority for this in our law: it would be a most revolting conclusion to come to, that the marriage of a man, who was capable of contracting in the land in which he was living, with a woman who was born and brought up in that land, and who

¹ *Acc. Sims v. Sims*, 75 N. Y. 466; *C. v. Hanlon*, 3 Brewst. 461 (*semble*). *Contra*, *Clark v. Hall*, 2 H. & M'H. 378 (*semble*); *S. v. Foley*, 15 Nev. 64; *Chase v. Blodgett*, 10 N. H. 24; *S. v. Candler*, 3 Hawks, 393. See *Campbell v. S.*, 23 Ala. 44; *Klein v. Dinkgrave*, 4 La. Ann. 540; *Uhl v. C.*, 6 Grat. 706. — Ed.

² Part of the statement of facts, the arguments, and parts of the opinions, involving the discussion of another point, are omitted. — Ed.

might even have been ignorant of her husband's attainder, was invalid, and their children illegitimate, because the man had been attainted before he went abroad. If such were the law, I should not shrink from enforcing it, but I believe it is not the law of our land, though it is said to be the law of France.

WILLES, J. . . . The only remaining question is, whether the marriage of an attainted person is valid. Whatever question there may be, if the marriage is contracted in this country, I think that where the marriage has been contracted abroad, by an innocent woman who may not even have known of the attainder of the person she was marrying, the rule, according to which the *lex loci*, with some exceptions founded on public policy, governs contracts, must prevail. But further, I think that the marriage, even if it had taken place in England, would have been valid. If we consider how attainder affects persons already married, upon what grounds, previously to the Divorce Act, could a marriage have been dissolved? Only by divorce for a cause existing at the time of the marriage, or natural death. There are many instances of persons who have been attainted returning upon a commutation of their sentence to their wives. The capacity for the matrimonial state, therefore, is not destroyed. Moreover, an attainted person is not incapable of contracting though he cannot pray in aid the King's courts to enforce his contracts. He can contract with those whose consciences bind them to fulfil their engagements, and he can take a grant, and grant to others even the inheritance which on office found would escheat to the Crown; and the rights so acquired by third parties may be the subject of actions in Her Majesty's courts. His contracts, too, can be enforced against him, and he cannot set up the disability arising from his own attainder. Further, I apprehend, any rule with respect to the validity of the marriage would only render it voidable, not void, unless the penalty that it should be void is actually fixed by law. This is the case, apart from statute, with other impediments, where there is a capacity and lawful authority to marry, though the marriage may be dissolved by a competent court during the lifetime of both the parties. The dictum referred to in Co. Litt. 133 *a* is merely metaphorical, and is so treated by Lord Coke. Reference has been made to the difference between the effects of civil death under the Code Napoléon and our own law. There is not only the distinction that by the former civil death produces *ipso facto* a divorce, but it is also expressly declared that the marriage of a person civilly dead shall not imply any civil rights; that is said to apply to a marriage out of France as well as to one in it; such a law is wholly foreign to our system, there are no two kinds of marriage in England, there is no such thing as a marriage without civil rights. For anything analogous to the French law, we must look to the marriages which under Roman jurisprudence were contracted between those who had not the right of Roman marriage, as two slaves, or a freedman and a slave. The only other instance of such secondary marriages are the morganatic marriages in Germany;

and there, though the children of the marriage can claim none of their father's rights, yet they are legitimate members of their mother's family, and as such can inherit from one another. I protest against the idea that there can be any such marriages in England, or that the children of a person marrying after his attainder are other than legitimate; but if such marriages did exist, no doubt they would be accompanied by a similar provision to that found in Germany.

KEATING and MONTAGUE SMITH, JJ., concurred.

Rule discharged.

WILSON v. KING.

SUPREME COURT OF ARKANSAS. 1894.

[Reported 59 Arkansas, 32.]

BATTLE, J.¹ In *Pillow v. King*, lately pending in this court, John Farmer executed a bond to stay proceedings on the decree appealed from in that case. He was afterwards released, on his application, from further liability, and S. C. Wilson executed another bond, in the sum of \$3,500, for the same purpose, which was filed with and approved by the clerk of this court. The condition and effect of the bond was as provided by section 1295 of Mansfield's Digest.

The decree which was appealed from in *Pillow v. King* was affirmed by this court, and King brought this action on the bond of Wilson to recover the damages he suffered during the pendency of the appeal by reason of being deprived of the use of the lands and other property, to the possession of which he was entitled under the decree affirmed, which he alleges exceeded the amount of the bond sued on. The defendant answered and alleged as follows:—

First. That King was incompetent to sue, "because he was civilly dead, having been found guilty . . . of murder in the first degree and been sentenced to death in Shelby County, Tenn." . . .

The jury returned a verdict in favor of the plaintiff for \$3,500, and judgment was rendered accordingly.

First. The conviction and sentence of King in the State of Tennessee did and does not affect his right to sue and recover in this State. Story on the Conflict of Laws (8th ed.), §§ 619-625. . . .

Judgment affirmed.

¹ Part of the opinion is omitted. — ED.

*He convicted of murder in Tenn. and
to be hanged. Sues in Ark.
Held: Tenn. civil death immaterial*

MAROTTE v. GRIFFON.

COURT OF CASSATION, FRANCE. 1808.

[Reported 10 *Merlin's Répertoire*, 563.]

IN 1794, after the second entry of the French army into the country of Liège, Marie Rosalie Philippine Marotte, domiciled at Yeneux, withdrew with her mother beyond the Rhine. On March 16, 1796, she married before the curé of Wittenberg, Pierre Griffon of La Rochelle, who was entered upon the list of émigrés of the department of Lower Charente, under date of June 26, 1792. After living with him a month, she left him and returned to Belgium, her native country. Being summoned before the military commission of Brussels as a returned émigré, she proved that she was not the Miss Marotte whose name was entered upon the list of émigrés, and thus obtained on the 8th Germinal, year VI, a judgment which acquitted and freed her. Hereupon she undertook the management of her property, and acted and contracted without dispute as an adult unmarried woman.

On the 16th Pluviose, year XI, Pierre Griffon obtained, by virtue of the *senatus-consultum* of the 6th Floreal, year X, a writ of amnesty which authorized him to return to France and restored him to all his rights as citizen. Armed with this writ, he removed to the department of Ourthe, and delivered, as husband of Miss Marotte, formal demands to all her tenants and debtors. Miss Marotte, also granted amnesty by a writ of the 26th Pluviose, year XI, cited him before the Tribunal of First Instance of Liège, to have the pretended marriage contracted between them in Germany, March 16, 1796, declared null.

On 20th Pluviose, year XII, judgment by default declared her not entitled to bring suit for nullity of said marriage; ordered her to return to Griffon; and authorized him to exercise the power of the law to compel her to do so.

Miss Marotte appealed from this judgment, and on the third Messidor, year XIII, the Court of Appeal of Liège delivered the following judgment:—

“It is agreed that the parties were married by the curé of Wittenberg, where they were living, and that all forms required in that country for the validity of marriages were observed. The defendant therefore legally acquired the position of husband of the appellant, and she voluntarily consented to become his wife, a position which she recognized after her return to her country, the former Belgium. The *senatus-consultum* of 6th Floreal, year X, permitting émigrés to return to France, and restoring to them all rights as citizens, should necessarily permit them to enter their old country with all the qualities and powers which they had legally acquired elsewhere, provided these qualities were not opposed to the existing laws at the time of the return. It follows that the defendant, in obtaining permission to return

to France, has also obtained the right to enter in the quality of married man which he had acquired. The effects of the civil death with which the émigrés were affected during their absence can apply only to the exercise of political or purely civil rights, and to all that concerns the interests of the Republic. It would be contrary to principle to conclude that émigrés would be incapable of entering outside of France into contracts founded on the law of nature and of nations, like the contract of marriage. Furthermore, Art. 4 of § 1 of the law of September 20, 1792, provides that emigration shall not of itself effect a dissolution of marriage, but offers to the spouse who has remained a sufficient ground for obtaining a divorce. Consequently if an old marriage continues, that contracted during the emigration should be declared valid: because in both cases this contract is entered into by the free will of the parties; and in the latter case there is no fault on either side, while in the former the spouse who remains in France may impute to the other an act which the law regards as a crime.

“The court dismisses the appeal, declares the marriage in question good and valid, and the suit for nullity ill-founded, and condemns the appellant to pay costs.”

The plaintiff appealed to the Court of Cassation.¹

THE COURT. Article 1 of the law of March 28, 1793, Article 1 of that of 12th Ventose, year VIII, and Article 15 of the *senatus-consultum* of 6th Floreal, year X, have been examined.

Article 7 of Title 2 of the Constitutional Act of September 3, 1791, provides that marriage shall be considered only as a civil contract; Article 3 of the law of March 28, 1793, declares émigrés civilly dead, and Article 1 of the law of 12th Ventose, year VIII, provides that émigrés cannot invoke the civil law of the French; and the parties have not denied their enrolment on the list of émigrés.

It is contrary to the nature of things that those condemned to civil death should contract such a marriage as shall have an effect on legal relations, as indicated in Article 25 of the Civil Code;² and it necessarily follows that the marriage in question, contracted while the parties were both in a state of civil death, was null and void from the beginning; and that the recognition of the marriage by the appellant while both parties continued in a state of civil death, could have no greater effect than the marriage itself, contracted in that state.

It is provided by Article 15 of the *senatus-consultum* of 6th Floreal, year X, that émigrés granted amnesty should be regarded as restored to their rights as citizens from that day only; this is confirmed by the opinion of the Council of State of 18th Fructidor, year XIII, to the effect that Article 15 of the *senatus-consultum* might well regard as valid marriages and other civil contracts of the émigrés made *after* the *senatus-consultum*.

¹ The arguments of counsel are omitted. — ED.

² “One civilly dead is incapable of contracting any marriage which can produce civil effects. A marriage which he may have previously contracted is dissolved as to its civil effects.” — ED.

Whence it follows that the judgment of 5th Messidor, year XIII, declaring the marriage in question valid, has contravened the laws of March 28 and 12th Ventose, year VIII, and has misapplied the *senatus-consultum* of 6th Floreal, year X.

Judgment quashed.

IN RE BLANCHARD.

COURT OF CASSATION, FRANCE. 1868.

[*Reported Dalloz*, 1868, 1, 262 ; *Sirey*, 1868, 1, 183.]

THE COURT. By the terms of Article 2123 of the Code Napoléon, and 546 of the Code of Procedure, judgments of foreign courts can produce no effect in France. This rule, which is only the consequence of the principle of the sovereignty of each State within its own territory, and of the protection which a State owes its subjects, is applicable to judgments rendered in criminal and correctional as well as in civil suits ; and it has been correctly held, in consequence, that punishment for a second offence can only be inflicted where the former conviction was in a French court.¹ According to Article 7 of the Code of Criminal Procedure of 1808, re-enacted and extended to misdemeanors by the law of June 27, 1866, no prosecution can be instituted in France against a Frenchman by reason of crimes or misdemeanors committed by him abroad, when the accused shows that he has already been convicted abroad for the same act ; and if the French law in this connection gives a certain force to the foreign judgment in France, this exception to the general rule, founded as it is on considerations of humanity which do not permit a man to be judged twice for the same act, should not be extended beyond the special case which it was created to meet. And though this purely negative effect attached to a foreign judgment may be regarded as derived from the principle of *res judicata* or *non bis in idem*, one cannot infer that it should produce all the effects of *res judicata* annexed by our law to the decisions of French courts ; for instance, that it should result in the deprivation of the electoral franchise which Article 15 of the organic decree of Feb. 2, 1852, makes the result of certain specified convictions. In the first place, it seems clear that Article 15 has had in view only the convictions pronounced by French courts, and not the quite exceptional case of a conviction pronounced by a foreign court ; since if the legislator wished electoral incapacity to result from the judgments of a foreign court he would have explicitly said so, as he did with regard to bankruptcy, in section 17 of the same Article 15, but only on condition that the foreign judgment should be

¹ *Acc.* 16 Clunet, 663 (Nancy, 11 Apr. '89) ; 18 Clunet, 981 (German R. G. ? July, '90.)—ED.

made executory in France, which makes the case an exception to the general rule. In the second case, it would be extraordinary if a foreign power could deprive a Frenchman of his rights as a citizen, and thus influence the composition of the body of electors.

From the foregoing it follows that in deciding that condemnation to fifteen years' imprisonment for theft pronounced on Nov. 5, 1866, by the Belgian tribunal of Charleroi against the appellant, would create the incapacity defined in Article 15, section 5, of the decree of Feb. 2, 1852, and in consequently refusing to place his name on the list of electors of the commune of Etreux, the judgment appealed from has falsely applied said article, as well as Article 5 of the Code of Criminal Procedure, and has formally violated the principle of public law declared in Article 546 of the Code of Civil Procedure and Article 2123 of the Code Napoléon. The judgment of the Justice of the Peace of the Canton of Wasigny, dated Feb. 24, 1868, is

*Quashed and annulled.*¹

AFFAIR OF NIKITCHENKOW.

SENATE OF RUSSIA. 1868.

[*Reported 1 Clunet, 47.*]

ACCORDING to the laws of Russia a condemnation to hard labor involves the loss of civil rights, including family rights and rights of property; it gives the spouse a right to demand a divorce; the convict loses all his property, both real and personal; his succession is opened from the day judgment is pronounced. In 1868, Alexander Nikitchenkow was condemned, at Paris, to hard labor; the Minister of the Interior referred to this court the question of his rights of property.

THE SENATE. Lieutenant Nikitchenkow was prosecuted in the Court of Assizes of the Seine, and the jury declared him guilty of attempt to murder Batsch, Savoie, and Piccolo, with extenuating circumstances; the attempt failed from causes independent of the will of the accused. The court condemned him to imprisonment with hard labor for life. This crime is punished by the Russian Code with hard labor and the loss of all civil rights, with the consequences provided by Article 25 of the Penza Code.²

¹ *Acc. 8 Clunet, 440* (Turin, 14 Dec. '78). So a foreign conviction does not operate, like a domestic conviction, to exclude from the militia: *5 Clunet, 518* (Cass. Belg., 26 Dec. '76); or to forfeit a pension: *18 Clunet, 1016* (Denmark, 18 Jan. '89).

² "The consequences of condemnation to hard labor are loss of family and property rights. At the expiration of the term of imprisonment, he is banished for life to Siberia."

Though in our laws it is not provided that a judgment rendered by a foreign court against a Russian subject who has committed a crime abroad should have executory force in Russia, yet such a judgment should not be regarded as without force; otherwise (in contradiction to Art. 22 of the Code of Criminal Procedure) the accused might be convicted a second time under the Russian Penal Code, for a crime already punished abroad according to the laws of the country where the crime was committed.

We therefore hold, in conformity with the opinions of the Ministers of Justice and of the Interior, that the property of Lieutenant Nikitchenkow, situated in Russia, should be subjected to the consequences of Articles 25 and 28 of the Russian Penal Code.

THOMAS v. GARDET.

COURT OF CASSATION, FRANCE. 1885.

[*Reported Journal du Palais*, 1886, 284.]

IN 1853 Ambroise Gardet, then less than eighteen years old, was prosecuted in the Court of Chambéry as an accessory to theft of chestnuts, a crime punished by imprisonment from three months to a year, according to the Sardinian law. Found guilty, he was, by virtue of a special provision of the Sardinian law, declared punished enough by the imprisonment already suffered. In spite of this condemnation, he had always been placed upon the voting-list since the annexation of Savoy to France. In 1885 M. Thomas demanded that his name be stricken off the list, because of the condemnation, according to Article 15, section 5, of the decree of February 2, 1852. This demand was rejected by the municipal commission. On appeal, the justice of the peace of Chamoux sustained the rejection for the following reasons: 1st, the decree of 1852 applied only to those guilty of theft as principals, not to accessories; 2d, Gardet's punishment having consisted merely of detention before conviction, he had not suffered the punishment of imprisonment for theft; 3d, incapacity to vote, being a merely ancillary punishment, must fail if the principal punishment did not exist; 4th, the condemnation had been pronounced by a foreign court.¹

Error was brought by Thomas, who in four assignments of error asserted that each of the grounds of judgment constituted a violation of law.

THE COURT. It is a rule of law that condemnations of crime by foreign courts are without effect in France; but there is an exception

¹ Only so much of the opinion as deals with the fourth assignment of error is given. — Ed.

where the country in which the sentence was imposed is afterwards annexed to the territory of France. The two sovereignties then become one; the court in which sentence was given is regarded, by a legal fiction, as always having been French, and its decision should therefore produce all the effects which it would have according to the law of France. On the other hand the foreigner, in becoming French, acquires all the rights dependent on this quality; but he can exercise them only if he fulfils all the conditions to which their enjoyment is subject, and consequently only if there is no cause of personal disqualification. Since in rejecting the appeal the judgment of the court below is based on a contrary principle, it has violated the law.

*Judgment quashed.*¹

MARTEL *v.* REYNAUD.

CIVIL TRIBUNAL OF GAP. 1892.

[Reported 19 *Clunet*, 951.]

By judgment of the Court of Assizes of the High-Alps, dated June 19, 1891, Clapier was condemned to five years at hard labor; and by Article 29 of the Penal Code the convict during this term is in a status of legal interdiction. But since Clapier is an Italian subject, and Article 32 of the new Italian Penal Code provides that legal interdiction shall result from a condemnation to more than five years' imprisonment or *ergastoli*, M. Martel, who was appointed Clapier's guardian by family counsel, on August 29, 1892, claims that Clapier is not legally interdicted, and that Reynaud, who is suing for damages, should not have made Martel defendant in a French court, but Clapier himself.

The principle is not denied that laws regulating the capacity and status of foreigners follow them into France; that they preserve their force and effect everywhere; and that legal interdiction, not being a penal matter, governs the status and capacity of the person, which depend upon the statute personal. It follows that Clapier, being an Italian subject, though condemned in France to a punishment of five years' hard labor, is not in a status of legal interdiction, since the Italian law creates this status only upon a punishment exceeding five years. Since he has every capacity for standing in justice, Reynaud should have sued him personally. . . .

Proceedings declared null.

¹ See, however, *Giribaldi's Case*, 3 *Clunet*, 185 (Aix, 14 Apr. '75). — Ed.

V.
WORMS v. DE VALDOR.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1880.

[Reported 49 *Law Journal*, *New Series*, *Chancery*, 261.]

THIS was an action for the delivery up and cancellation of certain bills of exchange accepted by the plaintiff, a French subject in France.

Objections were taken in the several statements of defence that the plaintiff, by French law, was incapacitated from suing without the intervention of his "Conseil Judiciaire," by reason of his having been adjudicated a "prodigal," and placed under a "Conseil de Famille" by the Tribunal of First Instance of the department of the Seine, the duly authorized court in France for that purpose.¹

FRY, J. The first objection which has been raised to the plaintiff's case is founded upon the fact that some time prior to the date of the bills of exchange he had been placed under that proceeding of the French law which is known as "Conseil de Famille," and it is said that that fact prevents his being able to sue in this court. That argument is based upon the 13th section of the Code Civil, which prevents "prodigals," among other things, from pleading without the assistance of counsel, who may be assigned by the court. I declined to stop the case on that preliminary objection, inclining to the view that if a change of status were effected by an order of a French court, this court would not take notice of a personal disqualification caused by such change of status. Assuming the proposition to be true that a personal disqualification was introduced by the judgment of the French court, I still adhere to that view, and I read a passage from Mr. Justice Story's "Conflict of Laws" (§ 104) as expressing the view I entertain: "Personal disqualifications not arising from the Law of Nature, but from the principles of the customary or positive law of a foreign country, and especially such as are of a penal nature, are not generally regarded in other countries where the like disqualifications do not exist; hence the disqualification resulting from heresy, excommunication, Popish recusancy, infamy, and other penal disabilities, are not enforced in any other country except that in which they originate. They are strictly territorial, so the state of slavery will not be recognized in any country where institutions and policy prohibit slavery." The learned author might have gone further with respect to slavery, for it is well known that in the celebrated case of *Somerset*, 20 Howell's State Trials, 1, the courts of this country, where villenage has never been abolished, declined to recognize the status of slavery resulting from the legislation of any other country.

It appears to me, however, that upon the point which is left for me to decide without the assistance of any French lawyers, that a part of the proceedings referred to was not to change the status of the plaintiff.

¹ Arguments of counsel are omitted. — Ed.

According to French jurisprudence, before the passing of the Code Napoléon, prodigality was one of the grounds which is known as interdiction: such interdiction as was passed in the case of a lunatic, for instance. But by the code matters were altered in that respect, and an interdict cannot now be passed against a person on the ground of prodigality. I find this laid down in Toullier's work on French law (2 Le Droit Civil Français, 5th ed. 443): "L'ancienne jurisprudence avait mis la prodigalité au nombre des causes qui pouvaient faire interdire un majeur; mais le Code n'en admet plus d'autres que l'état habituel d'imbécilité de démence ou de fureur." Then he says (Ib. 476): "À la différence de l'interdiction qui opère un véritable changement d'état, la nomination d'un conseil judiciaire n'en opère aucun dans la personne qui s'y trouve soumise; elle continue d'exercer par elle-même toutes ses actions, tous ses droits civils et politiques de voter dans les assemblées de famille et dans les assemblées primaires et électorales, de faire, en un mot, tous les actes de la vie civile: elle est seulement assujettie à prendre pour certains actes d'exception l'avis du conseil, qui doit la prémunir contre les erreurs et les surprises auxquelles elle est exposée dans la disposition des ses biens ou dans la direction de ses affaires." There being, therefore, no change of status but merely a requirement of French law in particular cases, it appears to me that that does not prevent the plaintiff in this case from suing in this action.

GATES v. BINGHAM.

SUPREME COURT OF ERRORS, CONNECTICUT.

[Reported 49 Connecticut, 275.]

ASSUMPSIT for the rent of a house, brought to the Court of Common Pleas, and tried to the court, on the general issue with notice, before MATHER, J. The following facts were found by the court:—

In 1871 Charles M. Pendleton was appointed by the court of probate for the district of Norwich in this State, conservator of the defendant, who was then a resident of the town of Norwich; the court finding that by reason of improvidence and prodigality he had become incapable of managing his affairs. Bingham was at that time twenty-three years of age. Pendleton duly qualified as conservator and has never been removed. . . . In December, 1876, the defendant married in Worcester, and at that time hired of the plaintiff a tenement there, at the rate of fifteen dollars a month, payable at the end of every month, where he resided with his wife till October 13, 1877.

The defendant paid the rent of this tenement until the 15th of July, 1877, but the rent from that time until October 13 has never been paid, and for the recovery of it this suit is brought. The tenement

was a suitable one for himself and family, and the rent reasonable, and the defendant and his family during the time were not otherwise provided with lodging. His conservator knew that he had hired a tenement of the plaintiff, and sent money to the defendant at times to pay the rent. The plaintiff was informed by the defendant that he had a conservator.

The defendant requested the court to rule that his disability by reason of the appointment of a conservator followed and was attached to his person; and that to render him liable in this suit, the same approval of the contract by the conservator would be required as would have been necessary if he had continued to reside in this State. The court refused so to rule; but ruled that the law of the place where the contract was made should govern, and that the disability of the defendant, by reason of the conservatorship, only continued while he resided within the jurisdiction of this State.

Upon these facts the court rendered judgment for the plaintiff. The defendant brought the record before this court by a motion in error.¹

GRANGER, J. There is clearly no error in the charge. The disability under which one is placed, with regard to his power to make contracts, by having a conservator appointed over him, is created wholly by statute, and can have no operation where the statute does not operate. It is a well settled principle that no statute can operate beyond the territorial limits of the State in which it was enacted. While the defendant was residing in the State of Massachusetts he was *sui juris*, and if incapable of managing his own affairs the only mode of securing a legal supervision for him was by proceeding under the laws of that State in the same manner as in the case of any other of its inhabitants. The defendant had in fact become an inhabitant and citizen of that State, and had ceased to be a citizen of Connecticut.

It does not affect the case that the suit is brought in this State. The contract upon which it is brought, being a valid and binding one in the State where it was made, is equally valid and binding in this State.

It cannot affect the case that the plaintiff knew that the defendant was under a conservator in Connecticut. Since he was legally free from the control of the conservator in Massachusetts, the fact that he had previously been under a conservator in this State was of no importance.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

¹ Part of the statement of facts and the arguments are omitted. — ED.

STATE TO USE OF GILBREATH v. BUNCE.

SUPREME COURT OF MISSOURI. 1866.

[Reported 65 Missouri, 349.]

SHERWOOD, C. J. Suit upon the defendant's bond as curator of the estate of the relator. The petition avers that the relator, Willie Gilbreath, is an infant, under the age of twenty-one years, and is now a resident of Washington County, in the State of Arkansas, and that Bunce is the curator of his estate, acting under appointment of the probate court of Cooper County, Missouri, and has in his hands, as curator, notes and money amounting to the sum of two thousand dollars; that the General Assembly of the State of Arkansas by an act approved February 18, 1869, entitled "An act to confer upon the probate and circuit courts of the State of Arkansas certain powers for removing legal disabilities of minors;" empowered the several probate courts of the State to authorize any person who is a resident within their jurisdiction, and who is under twenty-one years of age, to transact business in general, or any particular business specified, in like manner and with like effect as if the act or thing was done by a person above that age, and that such act should have the same force and effect as if done by a person of full age; that in pursuance of said act the probate court of Washington County, Arkansas, at its September term, 1875, ordered and adjudged that the disability of non-age of said Willie Gilbreath be removed, "so far as to authorize him to demand, sue for, and receive all moneys belonging to him in the State of Missouri, in the hands of his curator or any other person, and to execute releases therefor in the same manner as if he was of full age;" that by virtue of said act and judgment the legal disability of non-age was removed so far as to authorize him to demand, sue for, and receive all money belonging to him in the hands of his curator in the State of Missouri. The petition then sets out the bond of defendant Bunce, as curator, and for breach thereof, alleges the refusal of Bunce to pay over the money upon demand, and asks judgment for the amount in his hands. The suit is prosecuted by plaintiff in his own name and he appears thereto by attorney.

The defendants demurred to this petition, alleging as grounds thereof, that the petition showed upon its face that Willie Gilbreath was an infant under twenty-one years of age, and that he could not prosecute this suit by attorney, but must do so by next friend; that it also showed that Bunce was lawfully possessed of the money, and therefore stated no cause of action; that the act of the legislature and the order of the probate court of Arkansas was of no validity in this State, and could not affect the property under Bunce's control; and lastly, because the petition stated no cause of action. The petition was held insufficient, final judgment entered for defendant, and the case comes

here by writ of error. The demurrer was well taken in that the petition showed upon its face that the party to whose use this suit is brought, is an infant under the age of twenty-one years, and does not appear by guardian in conformity to statutory regulation. Wag. Stat., § 6, p. 1014, Ib. § 1, *et seq.*, p. 1003; Higgins v. R. R. Co., 36 Mo. 419; Jones v. Steele; Ib. 324; Copeland v. Yoakum, 38 Mo. 349. But the demurrer was well taken for a far weightier reason, a reason going to the very foundation of the suit. The legislature of Arkansas did not possess the power to pass a law to override and control our laws; no more could it authorize the probate court of Washington County to do this. Smith v. McCutchen, 38 Mo. 415; Story on Con. of Laws, §§ 539, 18, 103. Our own statutes (1 Wag. Stat., § 1, p. 672, and § 48, p. 681) provide when infants shall attain their majority, and they must be our guide, and not the laws that emanate from a foreign jurisdiction. Judgment affirmed. All concur.

Affirmed.

FAY v. OPPENHEIM.

CIVIL TRIBUNAL OF THE SEINE. 1889.

[Reported 17 *Clunet*, 870.]

THE TRIBUNAL. Fay & Co., English merchants, ask an *exequatur* for a judgment, rendered March 13, 1888, by the English Court of Queen's Bench, in their favor against Felix Oppenheim for 11,069 francs 30 centimes, balance of a charge of 15,872 francs for furnishings and repairs for a yacht. Oppenheim and his guardian (*conseil judiciaire*), Robert Esser, solicitor of the Tribunal of Bergheim, resisted the application. He alleges that the judgment of March 13, 1888, is null, so far as he is concerned (1) because his guardian was not made a party; (2) because the obligation he entered into with Fay is null, since it was more than a mere routine act.

As to the nullity of the judgment: the law of statute personal which governs the status of a citizen follows him abroad. Oppenheim, a German by birth, was placed under guardianship by a judgment of the Tribunal of Bergheim on January 6, 1881; this judgment has the same effect upon the capacity of the prodigal as proceedings under Art. 513 of the Civil Code have in the case of a Frenchman. It follows that Oppenheim can have no standing in any court whatever without his guardian, and a judgment rendered against him without making his guardian a party is therefore null.

It is objected that the English law does not recognize the special incapacity which results from prodigality, and that the English judgment of March 13, 1888, being regular and in conformity with English law, should be made executory; since as the question concerns for-

eigners only, it cannot involve any principle of French law. But the French courts are bound to respect the laws of general public order. A law relative to the capacity of persons is one of public order; the Tribunal should therefore inquire whether a foreigner condemned by a foreign court was defended in the court in accordance with the rules which govern his capacity. Supposing the English law does not recognize the special incapacity of prodigality, it does not appear that it would be impossible to join the guardian of a foreign defendant as a party in the English court; but at any rate, since it is the question of issuing execution in France, the French court should inquire whether the foreign decision satisfies all conditions which the French law regards as of public order. It follows that since Oppenheim was not joined with his guardian as party in the English court, the judgment of March 13, 1888, should not be executed in France.

The Tribunal of the Seine might, it is true, pass upon the merits of a suit against Oppenheim, joined with his guardian; but such a demand does not appear either in the allegations or in the prayers of this complaint; the prayer for damages being merely accessory to the demand for an *exequatur*.

For these reasons, John Fay & Co. cannot maintain this demand for an *exequatur*. The application is dismissed with costs.

SECTION II.

MARRIAGE.

HYDE v. HYDE.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. 1866.

[*Reported Law Reports, 1 Probate and Divorce, 130.*]

LORD PENZANCE, Judge Ordinary. The petitioner in this case claims a dissolution of his marriage on the ground of the adultery of his wife. The alleged marriage was contracted at Utah, in the territories of the United States of America, and the petitioner and the respondent both professed the faith of the Mormons at the time. The petitioner has since quitted Utah, and abandoned the faith, but the respondent has not. After the petitioner had left Utah, the respondent was divorced from him, apparently in accordance with the law obtaining among the Mormons, and has since taken another husband. This is the adultery complained of.

Before the petitioner could obtain the relief he seeks some matters would have to be made clear and others explained. The marriage, as it is called, would have to be established as binding by the *lex loci*, the divorce would have to be determined void, and the petitioner's conduct

in wilfully separating himself from his wife would have to be accounted for. But I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered "husband" and "wife" in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this court cannot properly exercise any jurisdiction over such unions.

Marriage has been well said to be something more than a contract, either religious or civil — to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognized one throughout Christendom: the laws of all Christian nations throw about this status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms — countries in which this institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian "wife." In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things — laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word "wife." But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognize and intend by the words "husband" or "wife," but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer. The language of Lord Brougham, in *Warrender v. Warrender*, 2 Cl. & F. 531, is very appropriate to these considerations: "If, indeed, there go two things under one and the same name in different countries — if

that which is called marriage is of a different nature in each — there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore, all that the courts of one country have to determine is whether or not the thing called marriage — that known relation of persons, that relation which those courts are acquainted with, and know how to deal with — has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer." "Indeed, if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such nature as that it is capable of being followed by, and subsisting with, another, polygamy being there the essence of the contract."

Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce; and that of the husband, if coupled with bigamy, is followed by the same penalty. Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband under the name of alimony at the rate of about one third of his income. If these and the like provisions and remedies were applied to polygamous unions, the court would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence. For it would be quite unjust and almost absurd to visit a man who, among a polygamous community, had married two women, with divorce from the first woman,

on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy. Nor would it be much more just or wise to attempt to enforce upon him that he should treat those with whom he had contracted marriages, in the polygamous sense of that term, with the consideration and according to the status which Christian marriage confers.

If, then, the provisions adapted to our matrimonial system are not applicable to such a union as the present, is there any other to which the court can resort? We have in England no law framed on the scale of polygamy, or adjusted to its requirements. And it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex.

This is hardly denied in argument, but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; that this court will be justified in treating such first union as a Christian marriage, and all subsequent unions, if any, as void; the first woman taken to wife as a "wife" in the sense intended by the Divorce Act, and all the rest as concubines. The inconsistencies that would flow from an attempt of this sort are startling enough. Under the provisions of the Divorce Acts the duty of cohabitation is enforced on either party at the request of the other, in a suit for restitution of conjugal rights. But this duty is never enforced on one party if the other has committed adultery. A Mormon husband, therefore, who had married a second wife, would be incapable of this remedy, and this court could in no way assist him towards procuring him the society of his wife if she chose to withdraw from him. And yet, by the very terms of his marriage compact, this second marriage was a thing allowed to him, and no cause of complaint in her who had acquiesced in that compact. And as the power of enforcing the duties of marriage would thus be lost, so would the remedies for breach of marriage vows be unjust and unfit. For a prominent provision of the Divorce Act is that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman that the Divorce Act goes further, and declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife. A Mormon, therefore, who had, according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the application of English law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void, as he had a wife living at the time of its celebration; and all this

without any act done with which he would be expected to reproach himself, or of which either woman would have the slightest right to complain. These difficulties may be pursued further in the reflection that if a Mormon had married fifty women in succession, this court might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial bond during the first wife's life.

Is the court, then, justified in thus departing from the compact made by the parties themselves? Offences necessarily presuppose duties. There are no conjugal duties but those which are expressed or implied in the contract of marriage. And if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law. So much for the reason of the thing.

There is, I fear, little to be found in our books in the way of direct authority. But there is the case of *Ardaseer Cursetjee v. Perozeboye*, 10 Moo. P. C. 375, 419, in which the Privy Council distinctly held that Parsee marriages were not within the force of a charter extending the jurisdiction of the ecclesiastical courts to Her Majesty's subjects in India, "so far as the circumstances and occasions of the said people shall require." And the following passage sufficiently indicates the grounds upon which the court proceeded: "We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws or some customs having the effect of laws which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief; but it must be recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as from time out of mind were incident to their own caste, nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages."

In conformity with these views the court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

*Petition dismissed.*¹

¹ Following this case, it was decided by STIRLING, J., *In re Bethell*, 38 Ch. D. 220, that the issue of a marriage contracted in South Africa between an Englishman and a

*his aunt, voidably but not avoided by
They moved to Mass. Could H sue on*

*to W.
marriage valid*

SUTTON v. WARREN.

very close SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1845.

[Reported 10 Metcalf, 451.]

ASSUMPSIT on a promissory note for \$1,300, given by the defendant to Ann Sutton, on the 10th of August, 1840. The case was submitted to the court upon the following facts agreed on by the parties:—

The note declared on was given for money lent by Ann Sutton to the defendant. The plaintiff and said Ann Sutton are natives of England, and were married at Duffield, in England, on the 28th of November, 1834. About one year after their marriage, they came to this country, where they have lived, as husband and wife, ever since. The said Ann was the own sister of the mother of the said Samuel Sutton, the plaintiff, and has always since said marriage gone by the name of Ann Sutton. Her former name was Ann Hills.

Judgment to be rendered for the plaintiff, if the court are of opinion that he is entitled to recover; otherwise, he is to be nonsuit.¹

HUBBARD, J. It is a well-settled principle in our law that marriages celebrated in other States or countries, if valid by the law of the country where they are celebrated, are of binding obligation within this Commonwealth, although the same might, by force of our laws, be held invalid, if contracted here. This principle has been adopted, as best calculated to protect the highest welfare of the community in the preservation of the purity and happiness of the most important domestic relation in life. *Greenwood v. Curtis*, 6 Mass. 378; *Medway v. Needham*, 16 Mass. 157; *West Cambridge v. Lexington*, 1 Pick. 506; *Compton v. Bearcroft*, Bul. N. P. 114; *Scrimshire v. Scrimshire*, and *Middleton v. Janverin*, 2 Haggard, 395, 437. There is an exception, however, to this principle, in those cases where the marriage is considered as incestuous by the law of Christianity, and as against natural law. And these exceptions relate to marriages in the direct lineal line of consanguinity, and to those contracted between brothers and sisters; and the exceptions rest on the ground that such marriages are against the laws of God, are immoral, and destructive of the purity and happiness of domestic life. But I am not aware that these exceptions, by any general consent among writers upon natural law, have been ex-

native woman, according to the native custom, could not take as legitimate. The court said: "I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England, unless it be formed on the same basis as marriages throughout Christendom, and be in its essence 'the voluntary union for life of one man and one woman, to the exclusion of all others.'" In *Brinkley v. Attorney-General*, 15 P. Div. 76, a marriage in Japan, according to the native custom, between an Englishman and a native, was held to be valid in England. See *Re Ullee*, 53 L. T. Rep. 711. — Ed.

¹ Arguments of counsel are omitted. — Ed.

tended further, or embraced other cases prohibited by the Levitical law. This subject has been carefully discussed by Chancellor Kent, in the case of *Wightman v. Wightman*, 4 Johns. Ch. 343; and while he is clear as to the exceptions before stated, he thinks, beyond them there is a diversity of opinion among commentators. 2 Kent Com., Lect. 26. See also Story's *Conflict of Laws*, §§ 113, 114. There is also a provision in our statutes, making marriages void in this State, where persons resident in the State, whose marriage, if solemnized here would be void, in order to evade our law, and with the intention of returning to reside here again, go into another State or country and there have their marriage solemnized. Rev. Sts., c. 75, § 6. The only object of this provision is, as stated by the commissioners in their report, to enforce the observance of our own laws upon our own citizens, and not to suffer them to violate regulations founded in a just regard to good morals and sound policy. As to the wisdom of this provision it is unnecessary here to speak. But the provision is noticed, to show that it has not been overlooked in the consideration of the case at bar, which presents no such state of facts.

In view of the whole matter, considering it as a part of the *jus gentium*, we do not feel called upon to extend the exceptions further. By our statutes, the marriage contracted between Samuel Sutton, the plaintiff, and Ann Hills, his mother's sister, if celebrated in this State, would have been absolutely void. But by the law of England, this marriage, at the time it was contracted, viz. in November, 1834, was voidable only, and could not be avoided until a sentence of nullity should be obtained in the spiritual court, in a suit instituted for that purpose. See *Poynter on Marriage and Divorce*, 86, 120; 2 *Stephen's Com.* 280. In *The Queen v. Inhabitants of Wye*, 7 Adolph. & Ellis, 771, and 3 Nev. & P. 13, the Court of King's Bench affirmed the doctrine, and held such a marriage voidable only, and that, till avoided, it was valid for all civil purposes. *Rosc. Crim. Ev.* (2d ed.) 286. Since this marriage was contracted, the St. of 6 Wm. IV., c. 54, has been passed, making such marriages which should afterwards be celebrated absolutely void.

In the present case, the marriage of these parties was not void by the laws of England, though voidable in the spiritual court. It never was avoided, and though absolutely prohibited by our laws, yet not being within the exception, as against natural law, we do not feel warranted in saying the parties are not husband and wife. The plaintiff, Samuel Sutton, sues on a promissory note given to the said Ann Sutton, and, as her husband, he can maintain an action thereon, in his own name alone, there being no other cause of objection raised than the one stated in regard to the legality of their marriage. *Bayley on Bills* (2d Amer. ed.), 42; *Clancy, Husb. & Wife*, 4.

Judgment for the plaintiff.

ROTH v. ROTH.

up. Dan subject. SUPREME COURT OF ILLINOIS. 1882.
See D. C. Stat. Dan.? [Reported 104 Illinois, 35.]

THIS is a bill by Madelaine Roth, claiming to be the widow of John George Roth to obtain her share of the property of said Roth situated in Illinois. The court dismissed the bill, and plaintiff appealed. The other facts appear in the opinion.¹

MULKEY, J. So far as the marriage between Roth and Madelaine Moser is concerned, we have no hesitancy in saying that for all purposes, in this State, it was a legal and valid marriage, notwithstanding Roth, at the time, was a subject of the kingdom of Würtemberg, and had not obtained a license authorizing such marriage from the sovereign of that kingdom, as required by the laws thereof. As both the parties were domiciled here at the time of its celebration, it is not important to determine whether the validity of a marriage depends upon the *lex domicilii* or the *lex loci contractus*, for whatever conclusion might be reached upon that question, the result would be the same, so far as this case is concerned. Both laws being identical, if the marriage was in conformity with either it must necessarily have been with the other also, and as it seems to have been solemnized in strict conformity with our statute regulating the subject, and as the parties were manifestly competent, under our own laws, to contract the relation, it follows, as before stated, the marriage was valid and binding.

While this marriage was clearly valid here for all purposes whatsoever, it does not follow that upon the return of the parties to the country of their nativity, and of which they were still subjects, it would or ought to be held equally valid there, for it is clearly settled by the decided weight of private international law, so called, that every State has the power to enact laws which will personally bind its citizens or subjects when sojourning in a foreign jurisdiction, provided such laws in terms profess to so bind them when thus circumstanced. It is true, such laws have no extraterritorial effect so as to authorize their enforcement in a foreign country, and may, therefore, so far as their execution is concerned, be said to remain dormant till the return of those violating them, when they will be enforced in the same manner, and to the same extent, as if their infraction had occurred within the State enacting them. Story on Conflict of Laws, §§ 114 *d*, 117, 244; Wharton on Conflict of Laws, § 161; Lawrence's Wheaton, p. 172; 4 Phill. Int. Law, 29, § 34; Piggott on Foreign Judgments, 167, 168; Dicey on Domicile, p. 215; 1 Burge on Col. Law, 188, 195, 196; 1 Bishop on Marriage and Divorce, § 368; Sussex Peerage Case, 11 Cl.

¹ This short statement is substituted for the statement of the reporter. Other points which were involved in the case are not here given. Part of the opinion is omitted. — Ed.

& Fin. 85; *Brook v. Brook*, 9 H. L. Cas. 193; *Fenton v. Livingston*, 3 Macq. 497; *Mette v. Mette*, 1 Sw. & Tr. 416; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Commonwealth v. Lane*, 113 Mass. 458.

Nor does it follow the status or relation created by the marriage could only be annulled by our own courts, or that it could only be annulled by other courts for such causes as would be recognized as sufficient for that purpose under our own laws. When the parties returned to Würtemberg and acquired a new domicile there, so far as their personal rights and relations are concerned our laws and government ceased to have any power over them or concern with them. Personally the State had no claims on them, and they owed it no allegiance or duty. *Barber v. Root*, 20 Mass. 260; *Hunt v. Hunt*, 72 N. Y. 228; *Kinnier v. Kinnier*, 45 N. Y. 535; *Cheever v. Wilson*, 9 Wall. 108; *Ditson v. Ditson*, 4 R. I. 87; *Harvey v. Farney*, L. R. 5 P. D. 153; same case affirmed, L. R. 6 P. D. 35; *Story on Conflict of Laws*, §§ 211, 213; 1 *Bishop on Marriage and Divorce*, §§ 367, 368; *Wharton on Conflict of Laws*, § 211; *Guthrie's Savigny on Private Internat. Law*, p. 248. Whether the kingdom of Würtemberg, on their return and acquiring a new domicile there, would recognize the status or relation which they had contracted here, depended upon its own laws, and not upon ours. That kingdom, in 1808, adopted an ordinance or law, which was in full force at the time of the marriage in Chicago, declaring all such marriages in a foreign State, without the license of the sovereign, absolutely null and void. It was, therefore, according to the general current of authority on the subject, entirely competent for the courts of that kingdom having jurisdiction of such matters, to give effect to that law by annulling and setting aside the marriage, upon a proper application for that purpose, which was done in this case. 1 *Bishop on Marriage and Divorce*, §§ 367, 368; *Story on Conflict of Laws*, §§ 18, 19, 21-23, 25; *Wharton on Conflict of Laws* (2d ed.), § 207; 4 *Phill. on Int. Law*, §§ 3, 11, 12, 13, 16, 24, 25; *Guthrie's Savigny on Private Int. Law*, 248.

Ordinarily, where a party, upon a change of domicile, goes into another State or country, the personal status which he carries with him will be recognized by the courts of the latter country. This is certainly the general rule, but it is subject to certain well recognized exceptions. If, for instance, such status has been acquired, as in the present case, by a violation of an express provision of the positive law of the State in which its recognition is asked, or if it be contrary to the genius and spirit of its institutions, as a title of nobility would be here, or if it is opposed to its settled policy, or to the good order and well being of society, or to public morality and decency, in all such cases the status would not and should not be recognized by the courts of the latter State. 2 *Kent*, p. 458; *Wharton on Conflict of Laws* (2d ed.), §§ 207, 165; *Story on Conflict of Laws*, §§ 93, 244; 4 *Phillimore on Int. Law* (ed. 1861), p. 529; *Brook v. Brook*, 9 H. L. Cas. 193; *Cincinnati Mutual Health Ass. v. Rosenthal*, 55 Ill. 91; *Forbes v. Cochrane*,

2 B. & C. 448; *Mette v. Mette*, 1 Sw. & Tr. 416; *Commonwealth v. Lane*, 113 Mass. 458; *Van Voorhis v. Brintnall*, 86 N. Y. 18.

Decree affirmed.

SCOTT and WALKER, J.J., dissenting.

*married in Russia,
marriage lawful, so as to
on it's acquiring*

UNITED STATES v. RODGERS.

DISTRICT COURT OF THE UNITED STATES, E. DIST. OF PENNSYLVANIA, 1901.

J was

[Reported 109 Federal Reporter, 886.]

im J. B. McPHERSON, District Judge. The relator is a naturalized citizen of the United States, and is the husband of Rosa Devine, and the father of her idiot son, William. Rosa and William are Russian Jews, whom the commissioner of immigration at the port of Philadelphia has ordered to be deported, on the ground that both are aliens, and that William is an idiot, and Rosa is a pauper that is likely to become a public charge. The alienage of both is denied upon the ground that when the husband and father became a citizen the wife and child ceased to be aliens; and this is the only point to be decided. The decision is admitted to depend upon the answer to be given to the question whether Rosa is the relator's lawful wife, or, rather, whether she is to be so regarded in this State; for she is her husband's niece, and such a marriage, if originally celebrated in Pennsylvania, would be void. Act 1860, § 39 (P. L. 393); 1 *Purd. Dig.* (ed. 1872), p. 54. Among the Jews in Russia, however, where the ceremony took place, it has been satisfactorily proved that a marriage between uncle and niece is lawful, and, being valid there, the general rule undoubtedly is that such a marriage would be regarded everywhere as valid. But there is this exception, at least, to the rule: If the relation thus entered into elsewhere, although lawful in the foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this State to recognize the foreign marriage as valid. I think the following quotation from Dr. Reinhold Schmid, a Swiss jurist of eminence, to be found in *Whart. Conf. Laws* (2d ed.), § 175, correctly states the proper rule upon this subject:—

“When persons married abroad take up their residence with us, it is agreed on all sides that the marriage, so far as its formal requisites are concerned, cannot be impeached, if it corresponds either with the laws of the place where the married pair had their domicile, or with those where the marriage was celebrated. But we must not construe this as implying that the juridical validity of the marriage depends absolutely on the laws of the place under whose dominion it was constituted; for the fact that a marriage was void by the laws of a prior domicile is no reason why we should declare it void if it united all the requisites of a

lawful marriage as they are imposed by our laws. So far as concerns the material conditions of the contract of marriage, we must distinguish between such hindrances as would have impeded marriage, but cannot dissolve it when already concluded, and such as would actually dissolve a marriage if celebrated in the face of them. A matrimonial relation that in the last sense is prohibited by our laws cannot be tolerated in our territory, though it was entered into by foreigners before they visited us. We will, therefore, tolerate no polygamous or incestuous unions of foreigners settling within our limits."

Other authority may be found in *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, where it is said, in determining the effect of a statute that forbade sexual intercourse between persons nearer of kin than cousins:—

"We hold, therefore, that by section 7019, Rev. St., sexual commerce as between persons nearer of kin than cousins is prohibited, whether they have gone through the form of intermarriage or not; nor is it material that the marriage was celebrated in a country where it was valid, for we are not bound, upon principles of comity, to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based upon principles of sound public policy, because they have assumed, in another State or country, where it was lawful, the relation which led to the acts prohibited by our laws."

See also *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157, 8 Am. Dec. 131, and *In re Stull's Estate*, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539.

In view of this exception to the general rule, it seems to me to be impossible to recognize this marriage as valid in Pennsylvania, since a continuance of the relation here would at once expose the parties to indictment in the criminal courts, and to punishment by fine and imprisonment in the penitentiary. In other words, this court would be declaring the relation lawful, while the court of quarter sessions of Philadelphia County would be obliged to declare it unlawful. Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public. A review of the Pennsylvania legislation affecting the marriage of uncle and niece will be found in *Parker's Appeal*, 44 Pa. 309. It is accordingly ordered that Rosa and William Devine be remanded.

ANONYMOUS.

PARLEMENT OF PARIS. 1624.

[*Reported 1 Journal des Audiences*, 16.]

A YOUNG Parisian, on account of some escapade, withdrew to Lorraine, where he enrolled himself in the Duke of Lorraine's company of light horse; he became enamoured of a young lady of the place, who was in the service of Madame Desbordes, and through his friends made known his affection for her. Thereupon a marriage was arranged, and the betrothal celebrated in face of the church. Bans were once published, the two other publications dispensed with, and two weeks later they were publicly married in presence of the relatives of the girl, and many persons of quality. After the marriage they lived together seven weeks as husband and wife, and the woman became enceinte, and a son was in due time born.

The parents of the husband having learned of their son's marriage without their advice and consent, the mother went to Lorraine, found means to speak to her son, persuaded him to return to Paris, and had him secretly take the post for that purpose.

The wife, having learned that her husband had thus been taken from her, and was in Paris, followed him incontinently, during the plague, and on her arrival inquired for her husband; having learned that he was at his father's house, she had summons served on him at his father's house calling on him to return to her. The parents, learning that the woman was bringing this suit, had her arrested, charging her with the crime of abduction. The criminal complaint made at request of the parents recited that their son had been seduced, that they had not consented to the marriage, and consequently, according to the Edict of Blois,¹ it was an abduction and no marriage; and by judgment of the Lieutenant Criminal of the Châtelet the woman was declared guilty of the crime of abduction, forbidden to live with her husband, and condemned to pay costs. From this judgment appeal was taken to the court. There it was shown that the marriage in question had been solemnized in the face of Holy Church, all the ceremonies required by the Council of Trent having been observed, as has been said, and therefore that there was nothing illicit about the marriage. As to default of consent of parents, it was not to be considered, because the marriage had been celebrated in Lorraine, a sovereign State, where the edicts and ordinances of our kings are not observed. In Lorraine they require no other solemnities than those of the Council of Trent, which were exactly observed in this marriage; and if the marriage were to be declared invalid and an abduction it would be prodigious and monstrous; for the marriage would be good and valid in Lorraine,

¹ 14 Rec. des Anc. Lois Franc. 391 (Ordinance of May, 1579, § 40.) — Ed.

and the child legitimate, but in France mere concubinage, and the child a bastard.

Thereupon judgment was given for the appellant; and as to the alleged crime of abduction, the complaint is dismissed. First President DE VERDUN delivered the judgment. *Gaultier* for appellant.

VIDAL *v.* VIDAL.

COURT OF PARIS. 1878.

[*Reported Dalloz*, 1878, II., 6.]

THE Civil Tribunal of the Seine delivered the following judgment.¹

Vidal married Estella Van Krenemburgh, a Hollander (who became French by the marriage), at Paris on November 14, 1864. By a judgment of this Tribunal, March 5, 1866, a judicial separation was granted to the Vidals. On October 25, 1873, Vidal and his wife, by common consent and in a single document dated at Paris, prayed the Council of State of the Canton of Schaffhausen for letters of naturalization, that they might both acquire Swiss nationality. On January 17, 1874, the Grand Council of the Canton of Schaffhausen granted naturalization to Vidal, and on the following 11th of March naturalization papers were delivered to him as a citizen of Osterfingen. By a certificate from the municipality of Osterfingen dated March 4, 1874, and by a certificate delivered from the Chancellery of State of the Canton of Schaffhausen on November 7, 1876, it appears that Mme. Vidal became as a result of these papers a Swiss subject, in conformity with the express request made by her, while the children of the marriage preserved their French nationality.

Hardly had the naturalization been obtained when on February 28, 1874, Vidal filed a libel for divorce in the Superior Court of the Canton of Schaffhausen; in the following April a similar libel was filed by Mme. Vidal; and on September 4 a final decree declared the marriage dissolved, and the spouses completely divorced, costs being divided, and all further demands waived on both sides. October 19 a certificate of nationality was delivered by the municipality of Osterfingen to Mme. Vidal, under the name of Adèle Estelle, born Van Krenemburgh, judicially divorced; the certificate, by an express provision, serving only for convenience in foreign travel, not for marriage, for the validity of which the conditions prescribed in the Canton must be observed. A month later, November 19, a new decree of the cantonal court authorized Mme. Vidal, divorced, to contract a second marriage after December 4; and, finally, January 23, 1875, Mme. Vidal married Louis Geoffroy, before the officer of civil status of the first ward of Paris, as

¹ Only so much of the judgment as deals with the case on the merits is given. — ED.

divorced wife of William Vidal authorized to remarry by the aforesaid decree.

From the foregoing, and from other documents in the case, it is clear that the Vidals desired Swiss nationality and sued for divorce by previous agreement, with a view to work a fraud on that principle of French law which regards the conjugal tie as indissoluble; that neither acquired Swiss nationality with a view of ever exercising the rights so obtained, or with the intention of fulfilling the corresponding obligations. Vidal did not leave France, but continued to dwell at Paris, where he still resides. In the same way Mme. Vidal submitted to the foreign law only that she might by divorce escape from the bonds of her first marriage and contract a second, by which she was going to recover the quality of Frenchwoman which she had just discarded.

A second marriage contracted before the dissolution of the first is by the French law absolutely null.

The defendants vainly set up, whether against Vidal or the public minister, the act of naturalization which has subjected the Vidals to the Swiss law, and the decree of divorce, which has separated them in accordance with that law. They cannot claim, against either, that the act of naturalization and the decree of divorce, emanating from an independent and sovereign foreign authority, cannot be nullified by the French courts. The naturalization of a Frenchman abroad has the result not only of making him acquire a foreign nationality, but at the same time of causing him to lose his quality as Frenchman. In this last respect it cannot prejudice the rights of any third party previously acquired under the protection of the French law. Furthermore, it ought to constitute, on the part of a Frenchman who obtains it, the exercise of a lawful right, and not the abuse of an opportunity and the nullification of the aforesaid legal protection. In this case the naturalization, if it has been obtained solely with a view to defraud the French law and to elude certain fundamental prohibitions of it, cannot be invoked as against interests of public and private order which that law aims to protect. The law of the French courts, thus declared, does not attack the principle of the respective independence of the sovereignties. These courts do not attempt to nullify the act of a foreign power, which indeed is beyond their control. They profess only to refuse it effect as to persons whom it could not bind, or as to the national law whose authority they must maintain.

Since the defendants cannot avail themselves of the act of naturalization which they invoke, they cannot set up the decree of divorce which depends upon it. It makes no difference that Vidal assented to these acts, since at the time he was acting fraudulently. His accomplice in the fraud cannot set them up against him as if they had been done under ordinary conditions. But even if they could be set up against Vidal, the public minister, whose right to demand nullity of the marriage is quite independent, is not affected by them.

The first marriage of Mme. Vidal was therefore not legitimately dis-

solved as regards the French law before she contracted the second, which is therefore absolutely null. The defendants vainly set up good faith in their marriage, which they say was contracted under an error of law shared by the officer of civil status himself. This justification is disproved by all the facts in the case, as they have been stated. This is true both in the case of Mme. Vidal, whose premeditated intent to contract a second marriage in spite of the first is abundantly established, and in the case of Geofroy, who must in reason have suspected the conditions under which he was marrying Mme. Vidal even if, contrary to all probability, he was not long since expressly informed of them.

For these reasons, the court permits the public minister to intervene in Vidal's suit for the nullity of Mme. Vidal's second marriage; declares null and void the marriage contracted by Mme. Vidal with M. Geofroy before the officer of civil status of the first ward of Paris, on January 23, 1875.

The Court of Paris affirmed the decision, adopting its reasons in every particular.

PLAQUET *v.* MAYOR OF LILLE.

COURT OF CASSATION. 1878.

[*Reported Sirey*, 1878, I. 320.]

THE COURT. By the terms of Article 147 of the Civil Code it is permitted to contract a second marriage when proof is made of the dissolution of the first. This proof is made on the part of a foreigner, when he shows that his marriage has been dissolved in accordance with the laws of the nation to which he belongs. His capacity being regulated in such a matter by his statute personal, his liberty to remarry follows him to France; and the juridical fact which has conferred this liberty cannot be ignored, even when he projects a new marriage with a Frenchwoman. The law of May 8, 1816, which abolished divorce in France, is not in point: nothing in the language of it indicates the intention of refusing effect to a legal divorce regularly decreed abroad by the courts of the proper country; this law, therefore, has tacitly recognized the respect due to foreign decrees operating upon the status and capacity of persons submitted to their sovereignty. It is objected, on the other hand, that public order and good morals are opposed to any marriage which the divorced foreigner would contract in France; but such an objection is met by the consideration that even a Frenchman himself, divorced before the law of 1816, has always been allowed in France, since the promulgation of that law, to contract a new marriage, and there is no reason to hold that what is morally and

legally allowed in the one case can be regarded in the other as contrary to public order and good morals.

It makes little difference, in the application of these principles, that the first marriage was contracted with a Frenchwoman; for since she thereby became a foreigner the decree of divorce has all the authority of a decree against foreigners, and if we can regard the woman as become French again it is only in so far as her marriage is regarded as legally dissolved.

It is recited as fact in the judgment appealed from that Abel Henry Plaquet, born at Lille of Belgian parents, retained the nationality of his father and mother; that in 1868 he married a Frenchwoman; but that as a result of a decree of the Civil Tribunal of Tournay (Belgium) for a divorce of the spouses, this divorce has been declared, in conformity with the Belgian law, by the proper officer of civil status, July 17, 1873. Consequently, when Plaquet presented himself in 1876 before the Mayor of Lille to contract a new marriage, he proved the dissolution of the first and did not come under the prohibition of Article 147 of the Civil Code. It follows that in authorizing the Mayor of Lille to refuse to proceed to the publications and celebration of the second marriage projected by said Plaquet, under pretence that it would be contrary to law, public order, and good morals, the judgment appealed from violated Articles 3 and 147 of the Civil Code, and falsely applied Article 6 of the same Code and Article 1 of the law of May 8, 1816.

Judgment quashed.

SECTION III.

— by Stat. of Merton
LEGITIMACY.

BIRTWHISTLE v. VARDILL.

HOUSE OF LORDS. 1840.

[Reported 7 *Clark & Finnelly*, 895.]

THIS case came from the King's Bench on Writ of Error. The case was first argued in the House of Lords in 1830. No judgment was then given, but on account of the difficulty and novelty of the case, it was ordered to be reargued.¹ On the first of July, 1839, the case was reargued before TINDAL, C. J., VAUGHAN, BOSANQUET, PATTESON, WILLIAMS, COLERIDGE, COLTMAN, and MAULE, JJ., and PARKE and GURNEY, BB. A question was framed and put to the judges; and their unanimous opinion was delivered in the following terms.²

¹ These proceedings are reported in 2 Cl. & F. 574. — Ed.

² This short statement is substituted for that of the reporter. Part of the advisory opinion is omitted. Lord BROUGHAM delivered an elaborate opinion, concurring, after doubt, with the Lord Chancellor. — Ed.

TINDAL, Lord Chief Justice. My Lords, the facts of the case upon which your Lordships propose a question to Her Majesty's judges are these: "A. went from England to Scotland, and resided and was domiciled there, and so continued for many years, till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland, according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child take place in Scotland, such child born in Scotland before the marriage is equally legitimate with children born after the marriage, for the purpose of taking land, and for every other purpose. A. died seised of real estate in England, and intestate." And your Lordships, upon the foregoing state of facts, found this question, viz.: "Is B. entitled to such property as the heir of A.?" And in answer to the question so proposed to us, I have the honor to state to your Lordships, that it is the opinion of all the judges who heard the argument that B. is not entitled to such property as the heir of A. We have, indeed, reason to lament that we have been deprived of the assistance of one of our learned brethren who heard the case argued at your Lordship's bar, the late Mr. Justice VAUGHAN; but as he had expressed a concurrent opinion upon the case at a meeting held immediately after the argument, I feel myself justified in adding the authority of his name to that of the other judges.

My Lords, the grounds and foundation upon which our opinion rests are briefly these: That we hold it to be a rule or maxim of the law of England, with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy, upon the supposed ground of the comity of nations.

My Lords, to understand the nature and force of this rule of our law, "that the heir must be a person born in actual matrimony in order to enable him to take land in England by descent," and to perceive, at the same time, the positive and inflexible quality of this rule, and how closely it is annexed to the land itself, it will be necessary to consider the earlier authorities in which that rule is laid down and discussed, both before and subsequently to the statute of Merton,

and more particularly the legal construction and operation of that statute. . . .

At the parliament holden at Merton, in the 20th Henry III., the statute was framed, which will be found to have a strong and direct application to the present question. That statute has not upon the original roll the title prefixed thereto, upon which observations were made at your Lordships' bar, that it showed the intention of the law to have been no more than to declare the personal status of those who are described in such statute. In the edition of the statutes published under the commission from the Crown, there is no other than the general title "*Provisiones de Merton*;" and no more argument can justly be built upon the title prefixed in some editions of the statutes, than upon the marginal notes against its different sections. That statute or provision of Merton runs thus, viz.: "*To the King's writ of bastardy, whether any one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered that they would not nor could not make answer to that writ, because it was directly against the common order of the church, and all the bishops instanted the lords that they would consent that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession to inheritance, forasmuch as the church accepteth such as legitimate. And all the earls and barons, with one voice, answered that they would not change the laws of the realm which hitherto had been used and approved.*" . . .

It therefore appears to be the just conclusion from these premises, that the rule of descent to English land is, that the heir must be born after actual marriage of his father and mother, in order to enable him to inherit; and that this is a rule of a positive inflexible nature, applying to, and inherent in, the land itself, which is the subject of descent, of the same nature and character as that rule which prohibited the descent of land to any but those who were of the whole blood to the last taker, or like the custom of gavelkind or borough-English, which cause the land to descend, in the one case, to all the sons together; in the other, to the younger son alone.

And if such be, as it appears to us to be, the rule of law which governs the descent of land in England, without any exception, either express or implied therein, on the score of the place of birth of the claimant, it remains to be considered whether, by any doctrine of international law, or by the comity of nations, that rule is to be let in by which B., being held to be legitimate in his own country for all purposes, must be considered as the heir-at-law in England.

The broad proposition contended for on the part of the plaintiff in error is, that legitimacy is a personal status to be determined by the law of the country which gives the party birth; and that, when the law of that country has once pronounced him to be legitimate, he is, by the comity of international law, to be considered as legitimate in

every other country also, and for every purpose; and it is then contended that, as by the Scotch law there is a *presumptio juris et de jure*, that, under the circumstances supposed, the parents of B. were actually married to each other before the birth of B., such presumption of the Scotch law, by which his legitimacy is effected, must also be adopted and received to the same extent in the English as in the Scotch courts of justice.

Now, there can be no doubt but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom.

But it does not therefore follow, that, with the adoption of the marriage contract, the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated. That the marriage in question was not celebrated in fact until after the birth of B. is to be assumed from the form of the question. Indeed, except on that supposition, there would be no question at all. Does it follow, then, that because the Scotch hold a marriage celebrated between the parents after the birth of a child to be conclusive proof of an actual marriage before, a foreign country, which adopts the marriage as complete and binding as a contract of marriage, must also adopt this consequence? No authority has been cited from any jurist or writer on the subject of the law of nations to that effect, — nothing beyond the general proposition that a party legitimate in one country is to be held legitimate all over the world. Indeed, the ground upon which this conclusion of B.'s legitimacy is made by the Scotch law, is not stated to us, and we have no right to assume any fact not contained in the question which your Lordships have proposed to us. We may, however, observe that, in the course of the argument at your Lordships' bar, the ground has been variously stated, upon which the laws of different countries have arrived at the same conclusion. It was asserted that, by the law of Scotland, the subsequent marriage is not to be taken to be the marriage itself, but only evidence, though conclusive in its nature, of the marriage prior to the birth of B.; that the canon law rests the legitimacy of the son born before such marriage upon a ground totally different, viz., that having been born illegitimate, he is made legitimate, *legitimatus*, by the subsequent marriage, by a positive rule of law, on account of the repentance of his parents; whereas, by the Scotch law, a marriage previous to his birth is conclusively presumed, so that he always was legitimate, and his parents had nothing to repent of. Pothier, on the other hand (*Contrat de Marr.*, part. v. ch. 2, art. 2), when he speaks of the effect of a subsequent marriage, in legitimating children born before it, disclaims the authority of the canon law, nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the custom of Troyes,

“ Les enfans nés hors mariage De Soluta et Solutâ puis que le père et la mère s'épousent l'un l'autre, succèdent et viennent à partage avec les autres enfans si aucuns y' à ; ” and then adds, “ that it is a common right received throughout the whole kingdom.”

Now it could never be contended by any jurist, that the law of England in respect to the succession of land in England, would be bound to adopt a positive law of succession like that which holds in France, the distinction being so well known between laws that relate to personal status and personal contracts, and those which relate to real and immovable property ; for which it is unnecessary to make reference to any other authority than that of Dr. Story, in his admirable Commentaries on the Conflict of Laws. (See sections 430 and following, where all the authorities are brought together). And if such positive law is not upon any principle to be introduced to control the English law of descent, what ground is there for the introduction into the English law of descents, not only of the contract of marriage observed in another country, which is admitted to be adopted, but also of a fiction with respect to the time of the marriage? that is, in effect, of a rule of evidence which the foreign country thinks it right to hold.

But admitting, for the sake of argument, and we are not called upon to give our opinion on that point, that B., legitimate in Scotland, is to be taken to be legitimate all over the world ; the question still recurs, whether, for the purpose of constituting an heir to land in England, something more is not necessary to be proved on his part than such legitimacy ; and if we are right in the grounds on which we have rested the first point, one other step is necessary, namely, to prove that he was born after an actual marriage between his parents ; and if this be so, then, upon the distinction admitted by all the writers on international law, the *lex loci rei sitæ* must prevail, not the law of the place of birth.

My Lords, in the course of the discussion, some stress appears to have been placed on the argument, that if B. had died before A. the intestate, leaving a child, such child might have inherited to A., tracing through his legitimate parent ; and then it was asked if the child might inherit, why might not the parent himself inherit? But the answer to that supposed case appears to be, that if the parent be not capable of inheriting himself, he has no heritable blood which he can transmit to his child ; so that the child could not, under the assumed facts, have inherited, and the question therefore becomes, in truth, the same with that before us. The case supposed would be governed by the old acknowledged rule of descent: “ Qui doit inheriter al père, doit inheriter al fitz.”

My Lords, the two decided cases that have been relied upon in the course of argument, that of *Shedden v. Patrick*, and that of the *Strathmore Peerage*, do not, upon consideration, create any real difficulty. Those cases decide no more than that no one can inherit without hav-

ing the personal status of legitimacy, — a point upon which all agree ; but they are of no force to establish the main point in dispute in this case, viz., that such personal status is sufficient of itself to enable the claimant to succeed as heir to land in England.

Upon the whole, in reporting to your Lordships as the opinion of the judges, “ that B. is not entitled to the real property as the heir of A.,” I am bound at the same time to state, that although they agree in the result, they are not to be considered as responsible for all the grounds and reasons on which I have endeavored to support and to explain such opinion.

LORD COTTENHAM, Lord Chancellor. My Lords, I was not in your Lordships’ house when this case was first argued ; but I was present at the argument when the learned judges were in attendance, and I gave my attention to the opinion expressed by the Lord Chief Justice, and I entirely concur in that opinion. I am extremely satisfied with the ground upon which the judges put it, because they put the question on a ground which avoids the difficulty that seems to surround the task of interfering with those general principles peculiar to the law of England, principles that at first sight seem to be somewhat at variance with the decisions to which the courts have come. Under these circumstances, as my noble and learned friend does not move the judgment, I move judgment for the defendant in error.

*Judgment accordingly.*¹

ATKINSON v. ANDERSON.

CHANCERY DIVISION. 1882. ^d

[*Reported 21 Chancery Division, 100.*]^f

THIS was a petition by the four natural children of James Anderson, praying for the distribution of a fund in court, the proceeds of sale of certain real estate situate in Cumberland. The principal question raised was whether the duty payable under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), should be at the rate of 1 or 10 per cent. James Anderson was a native of Cumberland. He left England prior

¹ *Acc. Fenton v. Livingston, 3 Macq. 497 ; Lingen v. Lingen, 45 Ala. 410 ; Williams v. Kimball, 35 Fla. 49, 16 So. 783 ; Smith v. Derr, 34 Pa. 167.* Conversely land was held to descend to persons described as heirs in the local statutes, though they were not legitimate by the law governing their status. *Harvey v. Ball, 32 Ind. 98 ; Estate of Oliver, 184 Pa. 306, 39 Atl. 72.* See *Leonard v. Braswell, 99 Ky. 528.*

It has, however, been held in other States, under the statutes of inheritance there in force, that one having a legitimate status (though illegitimate at birth) may inherit land. *Scott v. Key, 11 La. Ann. 232 ; Ross v. Ross, 129 Mass. 243 (semble) ; Miller v. Miller, 91 N. Y. 315.* So, conversely, that one illegitimate by the law governing his status cannot inherit, though by the law of the situs he would be legitimate, *Smith v. Kelly, 23 Miss. 167.* — Ed.

to October, 1839, and went to reside in Rome, and there carried on business as a photographer under the name of Isaac Atkinson, being desirous that his friends should not know where he was located. He resided in Rome down to the time of his death, and acquired an Italian or Roman domicil. He never married, but cohabited with an Italian woman, by whom he had four children, sons, all born in Rome prior to the year 1862. In 1870 the Papal States were annexed to the kingdom of Italy, and became subject to the government of King Victor Emmanuel. In the certificates of baptism of three of the children the names of the parents were given, but in the certificate of baptism of the second child they were not given. The mother died many years ago. The four children were acknowledged and treated by James Anderson as his own, and he paid for their maintenance and education.

In December, 1876, James Anderson made a will in the Italian language leaving his property equally between his four sons, naming them. This will was invalid according to the law of Italy because it was not executed before a notary; and it was invalid according to the law of England because it was not signed by the testator in the presence of two witnesses. James Anderson died on the 28th of February, 1877. On that day he made a will in English form and gave unto his four natural sons, naming them, all his property whatever, landed or real, in Italy, in England, or elsewhere, equally between them. He appointed executors, and they proved the will in May, 1877. James Anderson at the time of his death was entitled to real estates situate in Cumberland. An action of ejectment was brought in 1878 to recover possession of the estates. Subsequently and after much litigation a compromise was come to under the sanction of the court and in accordance with the terms agreed upon. The estates were sold for the sum of £8,000 and the money was paid into court to the credit of the action.

According to the law of the Papal States and of Italy, natural born children who have been recognized by their parents are entitled to right of succession. By the law of Italy a formal recognition is required, by the law of the Papal States any recognition is sufficient.

James Anderson having died intestate as to his personal estate and leaving no other than the four children named, they were admitted to succeed as *heredes ab intestato* to his personal estate in Rome — they having been sufficiently recognized by him as his natural born children, and they now asked by their petition that the fund in court should be ordered to be paid to them.¹

HALL, V. C. The question in this case has been very elaborately and ably argued. It is no doubt one of considerable importance and difficulty. I have to determine what is the status of the petitioners. The argument on their behalf has been that they are not strangers in blood to the testator. It has not been contended that they are his children in the

¹ Arguments of counsel are omitted. — Ed.

ordinary sense of the word, but that though not his children they are persons who according to the law of Rome may be described as being children who are capable of taking, and who have in fact taken, property as his natural children. They have taken property in Rome which belonged to the testator, having been recognized there as being his natural children — being as such, by the law of the country governing the succession to property, entitled to take it. It appears to me that I must, in construing the Succession Duty Act, 1853, determine the meaning of the last branch of section 10 according to what should be the interpretation to be put upon it by the court. Looking at the facts as to the status of the petitioners, I consider that it has been clearly proved that they were not born in wedlock, and that subsequently to their births their parents never became man and wife. That being so, according to the law of England they are unquestionably strangers in blood to the testator. There is nothing whatever to show, for the purposes of the statute, nor indeed in any sense, that the petitioners are in any other position than that, and the fact that they have been, by the law of their country, allowed to take the property of their father, as being his natural children, does not in my opinion, on the construction of the statute, make them anything else than strangers in blood. This seems to me to be the plain result of the evidence and the law in regard to their status, and I cannot recognize that, because of their being the natural children of the testator, there is some degree of relationship between them and him — their father — which should prevent their being held to be, for the purposes of the statute, strangers in blood to him, and therefore that they do not come within the last clause of the 10th section of the statute. That, in my opinion, is their position or character according to the law of England, and nothing has been shown which enables me to say that under the statute they are entitled to succession to this fund in any other. That which the petitioners obtained possession of in a foreign country, they got according to the law of that country, and they have no other status. I hold as regards the fund in court that the petitioners are strangers in blood to the testator, and that the Crown is entitled to be paid 10 per cent duty.

IN RE ANDROS. ^{over}

CHANCERY DIVISION. 1883.

[Reported 24 Chancery Division, 637.]

WILLIAM ANDROS, who died in January, 1882, by his will dated in August, 1879, gave (*inter alia*) one-third part of his personal estate to trustees “upon trust to pay and divide the same equally between such of his great nephews, the sons of his deceased nephew Thomas

Godfrey Andros," as should survive him and attain the age of twenty-five years, in equal shares; but he gave his said trustees absolute discretion to pay to his said great nephews, or either of them, the whole or any portion of the capital of the shares or share to which they or he might be presumptively entitled at any time or times his said trustees might consider it expedient to do so.

Thomas Godfrey Andros was a native of Guernsey, and by the laws of that island a child born before the marriage of his parents becomes legitimate upon their subsequent marriage as fully as if he had been born in wedlock.

The plaintiff was the son of T. G. Andros, and he was born in Guernsey in December, 1860. In January, 1865, T. G. Andros married in Guernsey the plaintiff's mother, he had four children after the marriage, and he died domiciled in Guernsey on the 12th of November, 1875. The plaintiff had attained twenty-one, and the trustees of the will being ready to pay him his due share of the one-third of the testator's residuary personal estate if they could lawfully do so, the question submitted for the opinion of the court was whether the plaintiff ought to be deemed to be a legitimate son of Thomas Godfrey Andros, and as such entitled to share with his children born after wedlock in the testator's bequest.

KAR, J. This will being an English will must of course be construed according to English law. That law requires that all who take under a gift to sons of a named father should be legitimate offspring. It must now be treated as settled that any person legitimate according to the law of the domicil of his father at his birth is legitimate everywhere within the range of international law for the purpose of succeeding to personal property.

The well-known case of *Doe v. Vardill*, 7 Cl. & F. 895; 6 Bing. N. C. 385; 9 Bl. (N. S.) 32, which introduced a distinction in this respect in the case of a person claiming to succeed as heir to real property in England by requiring such a person to establish his legitimacy according to English law—that is, as though the father had been domiciled in England at the time of the birth of the child—treats this as an exceptional case and recognizes that the rule of succession to personal estate is otherwise, and this has been recently more expressly decided by the Court of Appeal in *In re Goodman's Trusts*, 17 Ch. D. 266.¹

If, then, a child of a foreigner legitimate according to the law of his father's domicil, though illegitimate if his father had been a domiciled Englishman, can succeed as next of kin to personal estate in England, why should he not take a bequest of personalty by the description of the son of his father in the will of an English testator? On principle it seems to me very difficult to say why he should not.

However, in *Boyes v. Bedale*, 1 H. & M. 798, the late Lord Hatherley in a considered judgment decided that such a person could not take

¹ *Contra* *Lingen v. Lingen*, 45 Ala. 410. — Ed.

under a gift to the children of his father. The will and every term in it, his Lordship held, must be construed according to English law. If in a Canadian will there were a gift of £100, that would mean £100 Canadian currency not £100 sterling. So the testator "must be taken to mean a child in the sense in which the law of England understands the term."

Speaking with all deference, the illustration seems to me inapt and wanting in analogy. If two countries happen to have the same name for their monetary currency no one for a moment could suppose that a testator in one of these using the familiar name of the currency of his own country meant by that the currency of different value of the foreign country which happened to have the same name; but how does it follow from this that a gift to the children of a foreigner means such children only as would be legitimate if he had been a domiciled Englishman? A bequest in an English will to the children of A. means to his legitimate children, but the rule of construction goes no further. The question remains Who are his legitimate children? That certainly is not a question of construction of the will. It is a question of status. By what law is that status to be determined? That is a question of law. Does that comity of nations which we call international law apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it. The matter may be put in another way. What did the testator intend by this gift? That is answered by the rule of construction. He intended A's legitimate children. If you ask the further question, Did he intend his children who would be legitimate according to English law or his actual legitimate children? How can the rule of construction answer that?

Lord Hatherly considered that the bequest must be read to such children as would be legitimate according to the law of England if their father had been a domiciled Englishman at their birth. But is that according to the English rule of construction that children means legitimate children? Try it thus. Suppose the same rule of construction to prevail in Guernsey, and that in the will of a Guernsey testator there were a bequest to the children of an Englishman. According to *Boyes v. Bedale*, 1 H. & M. 798, children would mean such children as would be legitimate according to the law of Guernsey. By this construction *ante nati* of the English father would share with his children legitimate according to English law, because they would have been legitimate if the father had been domiciled in Guernsey, though they were in fact illegitimate by English, and, of course, by international law.

This would not carry out, but contravene, the rule of construction.

Vice-Chancellor Kindersley, in *In re Wilson's Trusts*, Law Rep. 1 Eq. 247, expressed his readiness to follow *Boyes v. Bedale*. The facts of that case, however, were not the same. A domiciled Englishman had married an Englishwoman. He went to Scotland, and without

having a Scotch domicile he sued for and obtained a Scotch divorce, which was not sufficient to dissolve the English marriage. The woman then married in Scotland a domiciled Scotchman, and had children by him, and the question was whether they could be considered legitimate in England. The decision of Vice-Chancellor Kindersley was supported in the House of Lords (*Shaw v. Gould*, Law Rep. 3 H. L. 55) on the ground that international law did not require the English courts to recognize such a divorce, and therefore the children were not by that law legitimate.

That decision does not apply, because it cannot be denied that the children in this case would be recognized as legitimate, for some purposes at any rate, by every other State in Christendom.

These are the two cases most nearly in point on the one side. On the other there are two decisions of Vice-Chancellor Stuart, Goodman *v. Goodman*, 3 Giff. 643, and *Skottowe v. Young*, Law Rep. 11 Eq. 474. The late Master of the Rolls observes of the former that the point was not there really considered and decided. See *In re Goodman's Trusts*, 14 Ch. D. 619. But according to the report it certainly was argued, and the decision was that *ante nati* born in England while the father was domiciled here could not take under a gift to children, but that an *ante natus* born in Holland when the father was domiciled there might take in conjunction with the *post nati* by the same mother whom he married in that country, thus legitimatizing the *ante natus* there. *Skottowe v. Young* was a question of legacy duty, but the same point was involved.

Besides these two cases there is the analogy which I have referred to derivable from the decisions, showing that a child legitimate by the law of his father's domicile may take as next of kin in a succession to personal estate in England.

But in addition to these considerations there is the opinion of Lords Justices Cotton and James in the case of *In re Goodman's Trusts*, 17 Ch. D. 266. The former says, *Ibid.* 295:—

“In *Boyes v. Bedale*, 1 H. & M. 798, the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named. The Vice-Chancellor held that a child exactly in the same position as Hannah Pieret was not entitled under the bequest. He said that the will, being that of a domiciled Englishman, must be construed according to English law, which, in my opinion, is correct so far as to require that this word ‘children’ shall be construed ‘legitimate children.’ But he held that English law recognized as legitimate only those children born in wedlock. This, though correct as regards the children of persons domiciled in England at the time of their birth, is, in my opinion, erroneous as to children born of parents who at the time of the birth were domiciled in a country by the law of which the children were legitimate.”

Lord Justice James says, 17 Ch. D. 299: “The decision in *Boyes v. Bedale* was on the ground that, in an Englishman's will, the children

of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman. But supposing it had been the will of a Frenchman, dying domiciled in England, and made in favor of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and such a construction?"

The decision in *In re Goodman's Trusts*, 17 Ch. D. 266, overruled the late Master of the Rolls, and was dissented from by Lord Justice Lush.

This conflict of authority leaves me free to decide this case according to my own opinion, which is in favor of the plaintiff's claim.

I observe that the testator describes the objects of his bounty not merely as the sons of his deceased nephew Thomas Godfrey Andros, but also as his own great nephews; but that, in my opinion, makes no difference. The law of this country by the comity of nations recognizes the plaintiff as legitimate, and therefore he is as much the lawful nephew of the testator as he is the lawful son of J. G. Andros.

The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognized in this country, those children are legitimate whose legitimacy is established by the law of the father's domicile. Thus *ante nati* whose father was domiciled in Guernsey at their birth, and subsequently married the mother so as to make the *ante nati* legitimate by the law of Guernsey, are recognized as legitimate by the law of this country, and can take under such a gift.¹

VAN MATRE v. SANKEY.

SUPREME COURT OF ILLINOIS. 1893.

[Reported 148 Illinois, 536.]

MARY F. VAN MATRE filed her bill in chancery in the Cook County Circuit Court, alleging that she and others named in the bill, including Caroline C. Sankey, were the heirs-at-law of Samuel Sankey, who died intestate in November, 1886, without issue or widow surviving him, and seized of certain lots and lands in said county, of which partition was sought among said collateral heirs of said decedent. The bill also set up that appellant Henry L. Glos and others claimed some interest in certain of the lands under tax deeds which were alleged to be void, and were asked to be removed as clouds upon the title of complainant and her co-heirs.

Caroline C. Sankey answered the bill, denying that others were inter-

¹ *Acc. In re Grey's Trusts*, [1892] 3 Ch. 88. — Ed.

ested in said land and lots, and claiming title in fee to the whole, as heir-at-law of the said Sankey, and filed her cross-bill, alleging that by virtue of certain adoption proceedings in the court of common pleas of Lycoming County, Pennsylvania, she was adopted by said Samuel Sankey, deceased, on the 2d day of January, 1879, and that said Sankey having died without issue, and leaving no widow him surviving, his estate descended to her as heir-at law. The cross-bill also alleged that said Glos and others held certain tax deeds which were a cloud upon her title, and alleging in the cross-bill, as amended, certain defects therein, and praying that the same be removed as a cloud, etc.

Upon the issues joined upon the original and cross-bills, the court found and decreed in accordance with the prayer of the cross-bill; dismissing the original bill; finding that the tax deeds alleged were void, and upon the terms of payment by complainant in the cross-bill, of the taxes for which the tracts were severally sold, interest and costs, etc., removing them, severally, as clouds, etc. From the decree dismissing the original bill and quieting the title in the complainant in the cross-bill, Mary F. Van Matre appeals, and from so much of the decree as finds the several tax deeds void and clouds, etc., the said Henry L. Glos appeals.¹

SHOPE, J. It is insisted that the decree of adoption, although valid in the State of the domicil of the child, and, *pro tempore*, of the person adopting her, cannot affect the descent of real property in Illinois, and *McCartney v. Osburn*, 118 Ill. 403, is cited as supporting that contention. This is a misapprehension of the case cited, as well as of the effect of the decree of adoption. In the *Osburn Case* the courts of Pennsylvania had given construction to clauses of a will as affecting property situated in that State, and the question was, whether the parties were estopped, by the construction there given, in proceedings in this State affecting real property in this State. It was held that they were not, and that the courts of each State must construe the will, as affecting lands within their respective jurisdictions, for themselves, and might do so as if the several properties were devised by separate wills. The real property passed under the law of its situs, and not by the law of the domicil of the testator, and therefore the will must be construed under the laws of this State, and that construction control its disposition. That case was expressly distinguished from *Hanna v. Read*, 102 Ill. 596, and like cases, in which it is held that the right to re-litigate is concluded by the former adjudication.

The proceeding in this case was in the nature of a proceeding *in rem*, the purpose being to change the status of the child in her relation to said Samuel Sankey. The decree of adoption was a declaration by competent authority, operative to change her status, and, *ipso facto*, to render her that which she was declared to be, — the heir-at-law of Samuel Sankey, — and capable of inheriting from him, in all respects, as if she had been his child born in lawful wedlock. 2 Black on

¹ Part of the statement of facts and part of the opinion are omitted. — Ed.

Judgments, 792, *et seq.* The statute under which the adoption proceedings were had, provides that the child shall be decreed to take the name of the adopting parents, "and have all the rights of a child and heir of such adopting parents, and be subject to the duties of such child." The decree, by force of this statute, established, *eo instanti* its rendition, the relation of parent and child, imposed upon the parties the reciprocal duties and obligations of that relation, and impressed upon and invested the child with the rights and qualities of a child and heir-at-law of Samuel Sankey. This we understand to be the construction of the statute by the courts of that State. Wolf's Appeal (Pa.) 13 Atl. 760. The status of appellee having been established under and existing by virtue of the *lex domicilii*, is to be recognized and upheld in every other State, unless such status, or the rights flowing therefrom, are inconsistent with or opposed to the laws and policy of the State where it is sought to be availed of.

This court, in *Keegan v. Geraghty*, 101 Ill. 26, quoted with approval the language of Mr. Justice Gray in *Ross v. Ross*, 129 Mass. 243, as follows: "It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and this status and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy," and the principle announced, with its limitation, was expressly approved. *Roth v. Roth*, 104 Ill. 348. In the *Keegan Case*, *supra*, the child, adopted under the laws of Wisconsin, sought in this State to take, not from the adopting parent, but from collaterals and by representation. This court expressly recognized the status established in Wisconsin, so far as it related to the right to inherit from the parent by adoption, because consistent with the laws of this State relating to descent to adopted children, but denied the right to take by representation from collateral kindred of the parent, for the reason that such taking was prohibited by and inconsistent with the laws of this State. Rev. Stat. sect. 1, par. 5, chap. 39. No inconsistency with our laws or their policy exists in this case. The rights claimed under and by virtue of the adoption in Pennsylvania are those, and none other, that would exist upon the creation of the same artificial relation in this State.

We are of opinion, therefore, that upon the death of Samuel Sankey without other children, the estate in Illinois descended to appellee, Caroline C. Sankey, as his child and heir-at-law, and that the court correctly decreed in dismissing the original bill.

*Decree affirmed.*¹

¹ *Acc.* *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596; *Ross v. Ross*, 129 Mass. 243; *Melvin v. Martin*, 18 R. I. 650, 30 Atl. 467. See *Stoltz v. Doering*, 112 Ill. 234. —Ed.

SECTION IV.

GUARDIANSHIP OF THE PERSON.

NUGENT v. VETZERA.

CHANCERY. 1866.

[*Reported Law Reports, 2 Equity, 704.*]

MOTION on behalf of the defendant, Albin Vetzera, that an order appointing the plaintiff Mrs. Nugent and her husband, and the Countess Gifford, as guardians of the infant plaintiffs during their respective minorities, might be discharged, and that such guardians might be ordered to deliver up the infants, who were Austrian subjects, to the custody of Signor Vetzera, their guardian duly constituted by the Imperial and Royal (Austrian) Consular Court at Constantinople; and also on behalf of the infant defendants, that an order directing that plaintiffs should be at liberty to serve the bill upon them out of the jurisdiction, might be discharged.

The facts were shortly as follows:—

The father of the infant plaintiffs and defendants, Signore Theodore Baltazzi, was a Greek by birth, but an Austrian subject, and carried on the business of a banker at Constantinople until his death in June, 1860. By his wife, who was an Englishwoman, and a member of the Church of England, he had ten children, all of whom survived him and were still under twenty-four, the age of majority according to the Austrian law. Signor Baltazzi died intestate, and administration of his estate, which was very considerable, was granted to his widow by the Austrian Consular Court at Constantinople, and she, and Etienne Mavrocordato, were also appointed by that tribunal guardians of the persons of the intestate's infant children.

Early in 1863 Madame Baltazzi contracted a second marriage with Mr. Alison, Her Britannic Majesty's envoy in Persia, and about the same time Etienne Mavrocordato resigned his office of guardian, upon which Signor Albin Vetzera (the defendant now moving), the secretary to the Austrian Embassy at Constantinople, was appointed one of the guardians in his place. Upon the death of their mother, Mrs. Alison, in December, 1863, Epaminondas de Baltazzi was appointed guardian of the children in her place. In July, 1865, Epaminondas de Baltazzi resigned his office of guardian, partly (as it was alleged) from differences between himself and Albin Vetzera as to the management of the children and administration of the intestate's property, of which they were joint "curators" or trustees, but principally from his being unable to comply with the direction of the Consular Court ordering him to fix his residence at Vienna for the purpose of having the children educated there.

On the 24th of July, 1865, the resignation of de Baltazzi was accepted, and by a decree of the Austrian Consular Court of the same date, Vetzera was appointed sole guardian of the children, with a direction that they should be brought up in the religion of their father, and sent as soon as possible to Vienna "in order to receive their education in that city, the only mode of awakening and consolidating the sentiments of faithful Austrian subjects."

It appeared that Madame Baltazzi was always most anxious that her children should receive an English education, and, with the consent of her husband, they were all brought up as members of the Church of England. Two of the girls were sent to school in England during his lifetime, and in 1861 the eldest boy was sent over to this country, and in 1862, after the marriage of the eldest daughter to Mr. Nugent, a gentleman living in London, two more boys and two of the girls were brought over from Constantinople to England under the care of Countess Gifford, and were now being educated in this country, spending their holidays with their married sister, Mrs. Nugent.

The state of the family, and the ages and residences of the children at the time of filing the bill (December, 1865) will appear from the following tabular statement:—

Residing in England.

Mrs. Nugent, the plaintiff, who was married in 1862 to Albert	
Llewellyn Nugent (a nephew of Field Marshal Count Nugent)	23
Alexandre (now at Eton)	16
Hector (at Rugby)	15
Aristides (preparatory school at Cheam)	14
Eveline { at Mrs. Watson's school in Gloucester Crescent, }	12
Charlotte { Hyde Park }	11

Residing at Constantinople.

Helen (wife of Signor Albin Vetzera)	19
Mary	17
Henry	8
Julia	5

After the resignation of Epaminondas de Baltazzi, Mrs. Nugent petitioned the Consular Court, but without success, for the appointment of herself as guardian over her infant brothers and sisters, and in the meantime Vetzera announced his intention of removing one of the boys and the two girls from England, and sent over a confidential female servant to take care of them during their journey to Constantinople. Mr. and Mrs. Nugent refused to let the children go, and acting upon the circumstance that a portion of the intestate's estate (£160,000) was invested in consols and in India 5 per cents, they had, on the 2d of December, 1865, filed this bill for the purpose of

making the infants wards of court, securing the trust funds in this country for their benefit, and having guardians appointed, and a proper scheme for their maintenance settled by the court.

On the 13th of December, 1865, an order was obtained for service of the bill upon the defendants out of the jurisdiction, viz.: Albin and Helen Vetzera, the three infants, Mary, Henry, and Julia Baltazzi, living with them at Constantinople, and Mr. Gilbertson, who was one of the trustees of Mrs. Nugent's marriage settlement.

On the 19th of December, 1865, an order was obtained appointing Mr. and Mrs. Nugent and the Countess Gifford guardians of the infant plaintiffs, and giving liberty to serve a copy of the order upon the defendant Albin Vetzera at Constantinople.

Against these orders the present motion was made on behalf of the defendant Albin Vetzera.

In the meantime, on the 22d of December, 1865, an order was made by the Austrian Consulate, on the petition of Vetzera, authorizing him to suspend all further payments of the allowance to the infants for the purpose of their education in England, until they should have been put under the control of their guardian, and also of Mrs. Nugent's allowance, until she should have ceased to interfere in the affairs of the guardianship.

Against this order, and that, by which her petition, that she might be appointed guardian, was refused, Mrs. Nugent had appealed to the Supreme Court of Vienna.

In his affidavit filed in support of the present motion, the defendant Vetzera stated that he was dissatisfied with the progress made by Eveline and Charlotte with their schoolmistress, and also that he considered it to be his duty as guardian to obey the directions of the Austrian Consular Court, and remove the infants from England. For that purpose he had made arrangements that Eveline and Charlotte should reside with himself and his wife at Constantinople, and a competent governess for their education at his own house was already engaged. With regard to the boys, he proposed to place one of them (Hector) with a gentleman and his wife, of the highest respectability, residing in Austria, but stated that he had no present intention of removing Alexandre and Aristides from where they now were, though he considered it of the greatest importance that the boys "should have the advantage of an Austrian education, to qualify them hereafter for that position to which, from their rank and fortune, they would as Austrian subjects in Austria naturally aspire."

Evidence was also given as to the jurisdiction over infant Austrian subjects exercised by the Austrian courts, and by them committed to the guardians.

The affidavits on behalf of the plaintiffs in favor of keeping the children in England, need not be stated in detail, as they were directed to the superiority of an English public school education, and English associations, over education at Constantinople, or even at Vienna.

Attention was also called in the affidavits to the strongly expressed and acted upon wish of the mother that the children should be brought up in England.¹

WOOD, V. C. As regards the more important matter in this case, a question of very great importance, but I think really of small difficulty, is raised. Having regard to the principles of international law, and the course that all courts have taken of recognizing the proceedings of the regularly constituted tribunals of all civilized communities, and especially of those in amicable connection with this country, it is impossible for me entirely to disregard the appointment of a guardian by an Austrian court over these children, who are Austrian subjects, and children of an Austrian father, merely because those who preceded Signor Vetzera in his guardianship have taken the course of sending the children over to this country for the purpose of educating them, seeing that he is now desirous of revoking that arrangement. I am now asked in effect to set aside the order of the Austrian court, and declare that this gentleman so appointed cannot recall his wards who have been sent to this country for the purpose of their education. It would be fraught with consequences of very serious difficulty, and contrary to all principles of right and justice, if this court were to hold that when a parent or guardian (for a guardian stands exactly in the same position as a parent) in a foreign country avails himself of the opportunity for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this court might be of opinion that an English course of education is better than that adopted in the country to which they belong. I cannot conceive anything more startling than such a notion, which would involve on the other hand this result, that an English ward could not be sent to France for his holidays without the risk of his being kept there and educated in the Roman Catholic religion, with no power to the father or guardian to recall the child. Surely such a state of jurisprudence would put an end to all interchange of friendship between civilized communities. What I have before me is nothing more or less than that case.

Now, it appears to me plain, that I must take these children as remaining in this country only with the sanction of Signor Vetzera, and without any interference on the part of the Austrian court. Then at a proper time he wishes to recall them from England. Of course if there had been no application to this court no one can doubt the course which things would have taken. He being sole guardian, when he thought the children had been long enough at school in England would take them, if he thought fit, from this country and they would be removed.

[His Honor, after stating the filing of the bill and the appointment of guardians in England who wished to retain the children in this country, continued: —]

¹ Arguments of counsel are omitted. — Ed.

This application being made, it is now sought to prevent Signor Vetzera from removing the children so sent to this country for their education, on the plea that this court has appointed guardians here in England (for which the jurisdiction is not to be disputed), and that having so appointed them, the court will do no more than look at what is most for the benefit of the infants.

Lord Bute's Case, 9 H. L. C. 440, is cited for the purpose of showing that I ought, if satisfied that it is more for the interest of the infants that they should remain here than be sent back to their own country, to supersede the authority of the foreign guardian and the authority of the court that has appointed him, which takes care of the education of its own subjects, and directs how it shall be carried into effect. It appears to me that no doctrine of that kind was in any way propounded in Lord Bute's Case, and certainly the other authority referred to, of Dawson v. Jay, 3 D. M. & G. 764 (called the American case), has no bearing upon the subject. Lord Cranworth there puts his decision on the ground that the child turned out to be a British subject, and that he had no authority to send a British subject out of the realm. In Lord Bute's Case the young marquis was a subject of the United Kingdom, and had very large property in England as well as in Scotland, and the question was, between the English and Scotch guardians, to which class the Crown, as *parens patriæ*, having full power to deal with the matter, should assign him. Can that be compared with a case in which the question is, whether I, sitting here as a judge in this country, am to decide whether or not the courts of the Emperor of Austria have rightly decided upon the mode in which they wish their subjects to be educated? The proposition is entirely beyond all reason, and this court would be exceeding very largely the judicious exercise of the powers which every tribunal has in an independent country over those who may be within its control and jurisdiction, if it attempted to form a judgment whether or not it was more expedient that these children, who are Austrian subjects, should be brought up in England rather than in Austria. The case apparently nearest in principle, perhaps, though not, on examination, to be compared with it, is that in which a Roman Catholic parent abandoning his child to Protestant instruction for several years, has sought to change its course of education and bring it back to his own form of religion. There the court would not allow the child's religious principles to be disturbed by changing the course of instruction under which it had so long been allowed to remain, holding that the father had, in effect, abandoned his right of choice. But that is not the case here. I see nothing on the facts to induce me to suppose that either this gentlemen as guardian, or the courts of Austria, in exercise of their rights over their own subjects, have at all abandoned these children, merely because they have allowed them to be educated for some four or five years in this country, where it was thought they could best be educated. To hold otherwise would render it most unwise for any foreign country to send her subjects to this country, as this court might say that the Queen of

England, as *parens patriæ*, can see to the education of children better than the Emperor of Austria, as *parens patriæ* within his own dominions, can. The same authority which we claim here on behalf of the Crown as *parens patriæ*, is claimed by every other independent State, and should not be interfered with except on some grounds which I do not think it necessary to specify, guarding myself, however, against anything like an abdication of the jurisdiction of this court to appoint guardians. With respect to the English guardians of these children I hold that the court has power to appoint them, and I continue those that have been appointed. The case may well happen of foreign children in this country without any one to look after or care for them, or who may require the protection of this court to save them from being robbed and despoiled by those who ought to protect them. These children, on the other hand, seem to have met with nothing but kindness from their relations on all sides, but it may be desirable that, so long as they remain in this country, they should have the protection of guardians living within the jurisdiction. Out of respect to the authority of the Austrian courts, by which this gentlemen has been appointed, I reserve to him, in the order I am about to make, all such power and control as might have been exercised over these children in their own country if they were there, and had not been sent to England for a temporary purpose. Taking that view of the case I have not asked to see the children. I could not be influenced by anything I might hear from them. I assume that they are most anxious to remain here, and not to go back to their own country, but I have no right to deprive the guardian appointed by the foreign court over them of the control which he has lawfully and properly acquired, has never relinquished and never abandoned, and under which authority alone they have remained here, and been maintained and supported here.

As regards the service of the bill on those children who are out of the jurisdiction, I must take it on the present bill, as no demurrer has been filed, that the order has been properly made. It is alleged that all the debts, funeral, and testamentary expenses of the testator have been paid, that part of his property is invested in this country, and that by the law of Austria these funds are divisible in given shares among the plaintiffs, and other children abroad who are interested in them, and therefore it has been thought right that they should be served with a copy of the bill, in order that they may come in in respect of their interest in the stock. I should be the more indisposed to disturb that order, as it is not asked to grant any proceeding against them, but that they should come in upon their common interest with the plaintiffs. I think, therefore, as things stand on the present state of the record, that I am not at liberty to discharge that order, and it follows, as a mere matter of course, that I ought to appoint a guardian *ad litem* for the purpose of answering.¹

¹ Compare *Dawson v. Jay*, 3 D. M. & G. 764 ; *Johnstone v. Beattie*, 10 Cl. & F. 150 ; *Stuart v. Marquis of Bute*, 9 H. L. C. 440. — ED.

WOODWORTH v. SPRING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1862.

[*Reported 4 Allen, 321.*]

✓ **HABEAS CORPUS.** The petitioner claimed the custody of Edward A Spring, a minor of the age of eleven years, whose father and mother A were residents of Chicago, Illinois, until their death, after which the petitioner, who is not a relative of the child, was appointed as his guardian under the laws of that State. The respondent, who is the child's aunt, brought him to this commonwealth in 1856, with the consent of the petitioner; and, in June, 1858, she was appointed as his guardian, without the knowledge of the petitioner, by the judge of probate of Berkshire County, where she resided. The present writ was brought by the petitioner for the purpose of asserting his right to the custody of the person of the child.

At the hearing before the chief justice, the respondent contended that the guardianship in Illinois could have no such effect or operation in this commonwealth as to entitle the petitioner to claim, on the facts stated, the right to the custody of the person of the child; and that if under other circumstances the petitioner could have such right, it was defeated by the appointment of the respondent as guardian in this commonwealth, by virtue of which she had the right to the custody of the person of the child; and these questions were reserved for the determination of the whole court.

The case was argued in September, 1861.

BIGELOW, C. J. The child whose custody is in controversy in this case, is legally domiciled in the State of Illinois. That was his domicile of origin; and as he has had, hitherto, no legal capacity to acquire a new one, and as the guardian appointed in the place of his origin has never intended to change the domicile of his ward, that of his birth still continues. Story, *Conf. Laws*, § 46. In determining the question of his legal custody in this commonwealth, he is therefore to be regarded as a foreign child who is lawfully within the jurisdiction of this State, having been brought within its limits, not forcibly or clandestinely, but with his own consent and with that of the petitioner, his duly appointed guardian under the laws of Illinois, who had the lawful custody of his person in that State. So much seems to be clear; and if the right to the possession and control of the person of the child depended on his domicile, the right of the petitioner to claim the custody of his person would be indisputable. But we are unable to see that the facts that the child was born in another State, and that he has never by an act or election of his own or of his guardian obtained a new home here, have a decisive bearing on the question at issue in the present case. He is now lawfully within the territory and under the jurisdiction of this commonwealth, and has a right to claim the protection and

security which our laws afford to all persons coming within its limits irrespective of their origin or of the place where they may be legally domiciled. Every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign State cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government. Effect may be given by way of comity to such laws by the judicial tribunals of other States and countries; but, *ex proprio vigore*, they cannot have any extraterritorial force or operation. The question whether a person within the jurisdiction of a State can be removed therefrom depends, not on the laws of the place whence he came or in which he may have his legal domicile, but on his rights and obligations as they are fixed and determined by the laws of the State or country in which he is found. The master, who, in his own country, has property in the person of a slave, and unlimited control over his services, cannot, in the absence of a constitutional provision having the force of paramount law, enforce his rights in a State where slavery is not recognized as a lawful domestic relation. The comity of a State will give no effect to foreign laws which are inconsistent with or repugnant to its own policy, or prejudicial to the rights and interests of those who are within its jurisdiction. Even the parental relation, which is everywhere recognized, will not be deemed to carry with it any authority or control beyond that which is conferred by the laws of the country where it is exerted. The *patria potestas* of a foreign parent over his child is not that which is vested in him by the laws of the place of his domicile, but that which exists by virtue of the parental relation in the country where the father seeks to enforce his authority. These well settled principles are founded on the necessity of securing and preserving to every State the exclusive sovereignty and jurisdiction within its own territory, and avoiding the confusion and conflict of rights and remedies which would ensue from attempting to give extraterritorial effect to the varying laws of different countries. *Statuta suo cluduntur territorio nec ultra territorium disponunt.* Every nation has an exclusive right to regulate persons and property within its jurisdiction according to its own laws, and the principles of public policy on which its own government is founded. It results from these principles, that persons exercising offices and trusts with which they are clothed by virtue of the laws of a particular State or country cannot undertake to transfer their power or capacity to act, so as to control persons or property situated beyond the limits of the jurisdiction of the government or sovereignty from which their authority is derived. An administrator appointed under the laws of a foreign State cannot act as such in this commonwealth. Nor, for like reasons, can a guardian appointed by virtue of the statutes of another State exercise any authority here over the person or property of his ward. His rights and powers are strictly local, and circumscribed by the

jurisdiction of the government which clothed him with the office. Story, Conf. Laws, § 499; Morrell v. Dickey, 1 Johns. Ch. 153; Kraft v. Wickey, 4 Gill & Johns. 322; Johnstone v. Beattie, 10 Cl. & Fin. 42, 113, 145. So far, therefore, as the claim of the petitioner to the custody of the child in the present case rests on a supposed rightful authority to control his person in this commonwealth, by virtue of his appointment as guardian in the State of Illinois, it is not supported either on principle or authority. He cannot assert his tutorial power, *de jure*, in our courts or within our territory.

But it by no means follows that his claim to the care of the child and the control of his person, and to the privilege of removing him from this commonwealth, is to be absolutely denied. On the contrary, it is the duty of the courts of this State, in the exercise of that comity which recognizes the laws of other States when they are consistent with and in harmony with our own, to consider the status of guardian which the petitioner holds under the laws of another State as an important element in determining with whom the custody of the child is to continue. It would not do to say that a foreign guardian has no claim to the care or control of the person of his ward in this commonwealth. If such were the rule, a child domiciled out of the State, who was sent hither for purposes of education, or came within the State by stealth, or was brought here by force or fraud, might be emancipated from the control of his rightful guardian, duly appointed in the place of his domicile, and thus escape or be taken out of all legitimate care and custody. But in such cases the foreign guardian would not be regarded here as a stranger or intruder. His appointment in another State as guardian of an infant, with powers and duties similar to those which are by our laws vested in guardians over the persons of their wards, would entitle him to ask that the comity of friendly States having similar laws and usages should be so far recognized and exerted as to surrender to him the infant, so that he might be again restored to his full rights and powers over him, by removing him to the place of his domicile. And if it should appear that such surrender and restoration would not debar the infant from any personal rights or privileges to which he might be entitled under our laws, and would be conducive to his welfare and promote his interests, it would be the duty of the court to award to the foreign guardian the custody of the person. This is the doctrine substantially stated by Lord Langdale in *Johnstone v. Beattie*, *ubi supra*, and confirmed in a subsequent judgment in the case of *Stuart v. Moore*, in the House of Lords, as reported in 4 Law Times (N. S.), 382.

Nor can we see that the appointment of a guardian over the minor by the probate court in this commonwealth operates to bar any decree by this court in favor of the foreign guardian, awarding to him the custody of his ward. Such an appointment might be expedient and proper for the purpose of clothing some one in this commonwealth with authority over the person of an infant for his protection and security

against any unauthorized interference or control. But it certainly would not conclusively settle his permanent status or condition so long as he remained an infant, or prevent his being removed from the Commonwealth by the guardian appointed in the place of his domicile, if the interests and welfare of the ward rendered such removal expedient or necessary. No doubt, so long as the child continues within this jurisdiction, the guardian appointed in the courts of this State would have the exclusive right to the custody of his person. But the decree of the probate court does not deprive this court of the power to adjudicate and determine the question of the proper custody of the child as between a domestic guardian and one appointed in the place of the domicile of the infant. The jurisdiction of this court to decide, on *habeas corpus* or other proper process, concerning the care and custody of infants, is paramount, and cannot be taken away by any decree of an inferior tribunal. *Commonwealth v. Briggs*, 16 Pick. 203. The result is, that neither of the parties to the present proceeding can assert or maintain an absolute right to the permanent care and custody of the infant who is now before the court. But it is for this court to determine, in the exercise of a sound judicial discretion, having regard to the welfare and permanent good of the child as a predominant consideration, to whose custody he shall be committed. The case must therefore stand for future disposition.¹

A. v. B.

SUPREME COURT OF AUSTRIA. 1881.

[Reported 19 *Sammlung von Civilrechtlichen Entscheidungen*, 238.]

THE Court of Appeal delivered the following opinion in this case :

It is admitted by all parties that the plaintiff A. and her former husband B. are Bavarian subjects ; and that by a decree, confirmed by the Supreme Court, the royal Bavarian District Court at Bamberg on April 16, 1879, dissolved the bonds of marriage existing between A. and B., declared B. the sole guilty party, and condemned him to pay the amount due by agreement or by law to A. at his death, and a like portion for the child. No decree was made, however, as to the guardianship and education of the child born of the dissolved marriage. A. now, alleging that B. during the progress of the suit secretly carried off their seven-year-old son William, came with him to Vienna, and established a domicile in the judicial district of Neubau, brought suit in the City Court of Neubau, and in accordance with the terms of sections 4 and 34 of the Civil Code demanded the application of the Bavarian law as to the custody of the child in case of divorce, and, by its terms,

¹ See *Kelsey v. Green*, 69 Conn. 291, 37 Atl. 679 ; *In re Rice*, 42 Mich. 528, 4 N. W. 284 ; *Townsend v. Kendall*, 4 Minn. 412. — Ed.

a decree of the court for the surrender of the seven-year-old son William, born during the existence of the marriage, into her guardianship and care with full powers.

Since the competence of the Austrian City Court of Neubau was not disputed by either party, the case depends first of all on the question whether in the decision upon the demand of A. the Bavarian law should be applied, or whether the decision is to be given only in accordance with the Austrian law.

The City Court in the decree from which A. has appealed held that the Bavarian law cannot be applied, in view of section 4 of the Civil Code: since the cases where a foreign law may be applied are exclusively determined by sections 34 to 37 of the Civil Code; and in all these cases it is a question of deciding the personal capacity of foreigners for contracting, or the validity of contracts themselves, but not the legal consequences of other facts, such as the consequences of dissolution of marriage in Bavaria.

We cannot agree with this decision of the lower court, for though sections 34 to 37 of the Civil Code contain no express provisions with respect to the determination of the legal results of a status, yet it cannot be doubted that in a case where the dissolution of a former status, as here the dissolution of the marriage between A. and B., follows the Bavarian law, the effects and results of this dissolution of marriage, a Bavarian act, are also to be decided according to the Bavarian law; especially in this case, where both spouses are Bavarian subjects, the dissolution of the marriage was decreed by Bavarian courts and by application of Bavarian law, and both spouses were at the time domiciled in Bavaria. The legal consequences resulting from the dissolution of marriage according to the Bavarian law followed, in Bavaria, immediately at the time of the legal act of divorce; and the circumstance that B. also changed his residence and acquired a domicile in Vienna makes no difference in the establishment of the legal consequences, such as the rights with respect to custody of the child, already created by Bavarian law as a result of the dissolution of the marriage, and, for instance, cannot deprive A. of her right already created by that law. The present residence of B. in Vienna has the consequence only that A. must enforce her right to the custody of the child, resulting, by the Bavarian law, from the aforesaid legal dissolution of status, in the Austrian courts, and according to Austrian procedure; but the petition she brings is to be investigated and adjudged according to the Bavarian law.

By the official certificate of the Bavarian Minister of Justice, dated August 15, 1880, it is proved that the Bavarian law contains no express provision about the right to the custody of children in case of dissolution of a marriage by divorce; and therefore the common law has subsidiary value as supplying the omission in the Bavarian law. Accordingly it is further stated in a supplementary official certificate of the Bavarian Minister of Justice, dated September 14, 1880, that

the provisions of the Roman law in Novel 117, cap. 7,¹ are in force both in theory and in practice as a still existing principle of the common law, brought into use as subsidiary law to piece out the Bavarian law. It is further shown in the same official certificate that the Roman law, that is, Novel 117, cap. 7, is in this case identical with the common law. Furthermore, from the interpretation of the text of this Novel cited in the transaction, an interpretation which neither side disputes, it follows clearly and undoubtedly that in case of a divorce the right of custody of children born of the marriage belongs to the party who is not to blame for the separation. Finally in the legal decree of divorce granted by the Bavarian court B. is declared the sole guilty party. The petitioner A., therefore, according to this Novel which is in force in Bavaria as subsidiary law, has the right, as a result of the legal decree of divorce in the Bavarian court, to the custody of the child born of the marriage, so long as she herself does not marry again. She is therefore entitled to claim that her seven-year-old son William be taken away from her late husband B. and handed over to her custody and care.

The Supreme Court affirmed the decision of the Court of Appeal for the appropriate and legal reasons stated by them.

SECTION V.

INCORPORATION.

BANK OF AUGUSTA v. EARLE.

SUPREME COURT OF THE UNITED STATES. 1839.

[*Reported 13 Peters, 519.*]

TANEY, C. J.² The questions presented to the court arise upon a case stated in the Circuit Court in the following words: —

“The defendant defends this action upon the following facts, that are admitted by the plaintiffs: that plaintiffs are a corporation, incorporated by an act of the legislature of the State of Georgia, and have power usually conferred upon banking institutions, such as to purchase

¹ Illud quoque disponendum esse perspeximus, ut si quando inter maritum et uxorem nuptias solvi contigerit: ex huiusmodi nati filii, nullo modo, laedantur ex separatione nuptiarum, sed ad parentum hereditatem vocentur, ex patris substantia indubitanter alendi. Et si quidem pater occasionem separationis praebeat, et mater ad secundas non venerit nuptias: apud matrem nutriantur, expensas patre praebente. Si vero per causam matris ostendatur solutum matrimonium: tunc apud patrem maneanť filii, et alantur. Si autem contigerit patrem quidem minus idoneum esse, matrem vero locupletem: apud eam pauperos filios manere et ab ea nutrirí iubemus.

² Part of the opinion of the court only is given. M’KINLEY, J., delivered a dissenting opinion. — ED.

bills of exchange, etc. That the bill sued on was made and indorsed, for the purpose of being discounted by Thomas M'Gran, the agent of said bank, who had funds of the plaintiffs in his hands for the purpose of purchasing bills, which funds were derived from bills and notes discounted in Georgia by said plaintiffs, and payable in Mobile; and the said M'Gran, agent as aforesaid, did so discount and purchase the said bill sued on, in the city of Mobile, State aforesaid, for the benefit of said bank, and with their funds, and to remit said funds to the said plaintiffs.

“If the court shall say that the facts constitute a defence to this action, judgment will be given for the defendant, otherwise for plaintiffs, for the amount of the bill, damages, interest, and cost; either party to have the right of appeal or writ of error to the Supreme Court upon this statement of facts, and the judgment thereon.”

Upon this statement of facts the court gave judgment for the defendant; being of opinion that a bank incorporated by the laws of Georgia, with a power among other things to purchase bills of exchange, could not lawfully exercise that power in the State of Alabama; and that the contract for this bill was therefore void, and did not bind the parties to the payment of the money.

It will at once be seen that the questions brought here for decision are of a very grave character, and they have received from the court an attentive examination. A multitude of corporations for various purposes have been chartered by the several States; a large portion of certain branches of business has been transacted by incorporated companies, or through their agency; and contracts to a very great amount have undoubtedly been made by different corporations out of the jurisdiction of the particular State by which they were created. In deciding the case before us, we in effect determine whether these numerous contracts are valid or not. And if, as has been argued at the bar, a corporation, from its nature and character, is incapable of making such contracts; or if they are inconsistent with the rights and sovereignty of the States in which they are made, they cannot be enforced in the courts of justice.

Much of the argument has turned on the nature and extent of the powers which belong to the artificial being called a corporation and the rules of law by which they are to be measured. On the part of the plaintiff in error, it has been contended that a corporation composed of citizens of other States are entitled to the benefit of that provision in the Constitution of the United States which declares that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;” that the court should look behind the act of incorporation, and see who are the members of it; and, if in this case it should appear that the corporation of the Bank of Augusta consists altogether of citizens of the State of Georgia, that such citizens are entitled to the privileges and immunities of citizens in the State of Alabama; and as the citizens of Alabama may unquestionably purchase

bills of exchange in that State, it is insisted that the members of this corporation are entitled to the same privilege, and cannot be deprived of it even by express provisions in the constitution or laws of the State. The case of the *Bank of the United States v. Deveaux*, 5 Cranch, 61, is relied on to support this position.

It is true, that in the case referred to, this court decided that in a question of jurisdiction they might look to the character of the persons composing a corporation; and if it appeared that they were citizens of another State, and the fact was set forth by proper averments, the corporation might sue in its corporate name in the courts of the United States. But in that case the court confined its decision, in express terms, to a question of jurisdiction; to a right to sue; and evidently went even so far with some hesitation. We fully assent to the propriety of that decision; and it has ever since been recognized as authority in this court. But the principle has never been extended any farther than it was carried in that case; and has never been supposed to extend to contracts made by a corporation, especially in another sovereignty. If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any State in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to the citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the State. This would be to give the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself. Besides, it would deprive every State of all control over the extent of corporate franchises proper to be granted in the State; and corporations would be chartered in one to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question. Whenever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State; and we now proceed to inquire what rights the plaintiffs in error, a corporation created by Georgia, could lawfully exercise in another State; and whether the purchase of the bill of exchange on which this suit is brought was a valid contract, and obligatory on the parties.

The nature and character of a corporation created by a statute, and

the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this court.

In the case of *Head and Amory v. The Providence Insurance Company*, 2 Cranch, 127, Chief Justice Marshall, in delivering the opinion of the court, said, "Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.

"To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record."

In the case of *Dartmouth College v. Woodward*, 4 Wheat. 636, the same principle was again decided by the court. "A corporation," said the court, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."

And in the case of the *Bank of the United States v. Dandridge*, 12 Wheat. 64, where the questions in relation to the powers of corporations and their mode of action were very carefully considered, the court said, "But whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation; corporations created by statute must depend both for their powers and the mode of exercising them, upon the true construction of the statute itself."

It cannot be necessary to add to these authorities. And it may be safely assumed that a corporation can make no contracts, and do no acts either within or without the State which creates it, except such as are authorized by its charter; and those acts must also be done, by such officers or agents, and in such manner as the charter authorizes. And if the law creating a corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the State, all contracts made by it in other States would be void.

The charter of the bank of Augusta authorizes it, in general terms, to deal in bills of exchange; and, consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another State. The power thus given clothed the corporation with the right to make contracts out of the State, in so far as Georgia could confer it. For whenever it purchased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another State; and the general power to purchase bills without any restriction as to place, by its fair and natural import, author-

ized the bank to make such purchases, wherever it was found most convenient and profitable to the institution; and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that State could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction.

But it has been urged in the argument, that notwithstanding the powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the State; that the laws of a State can have no extra-territorial operation; and that as a corporation is the mere creature of a law of the State, it can have no existence beyond the limits in which that law operates; and that it must necessarily be incapable of making a contract in another place.

It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of *The United States v. Amedy*, 11 Wheat. 412, and in *Beaston v. The Farmer's Bank of Delaware*, 12 Peters, 135. Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place?

The corporation must, no doubt, show that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence, as an artificial person, in the State of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

Every power, however, of the description of which we are speaking,

which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed: whether, by the comity of nations and between these States, the corporations of one State are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them, according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's Conflict of Laws, p. 37, that "in the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."

Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another State. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts, since the case *Henriquez v. The Dutch West India Company*, decided in 1729, 2 L. Raymond, 1532. And it is a matter of history, which this court are bound to notice, that corporations created in this country have been in the open practice for many years past of making contracts in England of various kinds, and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract, by which an American cor-

poration had borrowed money in England; yet if the contracts of corporations made out of the State by which they were created, are void, even contracts of that description could not be enforced.

It has, however, been supposed that the rules of comity between foreign nations do not apply to the States of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the Constitution of the United States. The court think otherwise. The intimate union of these States, as members of the same great political family, the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity and friendship and kindness towards one another than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these States? They are sovereign States, and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one State, by a corporation created in another. The numerous banks established by different States are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other States, and suffered to make contracts without any objection on the part of the State authorities. These usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced in by the States, that the court cannot overlook them when a question like the one before us is under consideration. The silence of the State authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another State. But we are not left to infer it merely from the general usages of trade and the silent acquiescence of the States. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion, that it has been decided in many of the State courts, we believe in all of them where the question has arisen, that a corporation of one State may sue in the courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that

power, why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty — where the last mentioned power does not come in conflict with the interest or policy of the State? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied.

We turn in the next place to the legislation of the States.

So far as any of them have acted on this subject, it is evident that they have regarded the comity of contract, as well as the comity of suit, to be a part of the law of the State, unless restricted by statute. . . .

We think it is well settled that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public, and well known and long continued usages of trade, the general acquiescence of the States, the particular legislation of some of them, as well as the legislation of Congress, all concur in proving the truth of this proposition.

But we have already said that this comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made. And it remains to inquire whether there is anything in the constitution or laws of Alabama from which this court would be justified in concluding that the purchase of the bill in question was contrary to its policy.¹ . . .

When a court is called on to declare contracts thus made to be void upon the ground that they conflict with the policy of the State, the line of that policy should be very clear and distinct to justify the court in sustaining the defence. Nothing can be more vague and indefinite than that now insisted on as the policy of Alabama. It rests altogether on speculative reasoning as to her supposed interests, and is not supported by any positive legislation. There is no law of the State which attempts to define the rights of foreign corporations.

We, however, do not mean to say that there are not many subjects upon which the policy of the several States is abundantly evident, from

¹ The learned judge here examined the legislation of Alabama and the decisions of the Supreme Court of the State, and found no reason to doubt that Alabama had adopted "the law of international comity." — ED.

the nature of their institutions and the general scope of their legislation, and which do not need the aid of a positive and special law to guide the decisions of the courts. When the policy of a State is thus manifest, the courts of the United States would be bound to notice it as a part of its code of laws, and to declare all contracts in the State repugnant to it to be illegal and void. Nor do we mean to say whether there may not be some rights under the Constitution of the United States which a corporation might claim under peculiar circumstances, in a State other than that in which it was chartered. The reasoning, as well as the judgment of the court, is applied to the matter before us, and we think the contracts in question were valid, and that the defence relied on by the defendants cannot be sustained.

The judgment of the Circuit Court in these cases must therefore be reversed with costs.¹

¹ *Acc. Bateman v. Service*, 6 App. Cas. 386; *Thompson v. Waters*, 25 Mich. 214; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Bank v. Hall*, 35 Oh. St. 158; *Canadian Pac. Ry. v. W. U. Tel. Co.*, 17 Can. 151.

A foreign corporation may be expressly forbidden by statute to do an act; as by a general statute applying to all corporations, foreign or domestic. *P. v. Howard*, 50 Mich. 239; *Bard v. Poole*, 12 N. Y. 495. So it may not do an act for doing which a special franchise is required. *Dodge v. Council Bluffs*, 57 Ia. 560; *Middle Bridge Co. v. Marks*, 26 Me. 326. So it may not do any act which is against the public policy of the State: *American Col. Soc. v. Gartrell*, 23 Ga. 448; but in the absence of legislation forbidding the act, the case must be a very clear one before the court can say that the act is against public policy. *Cowell v. Springs Co.*, 100 U. S. 59; *Stevens v. Pratt*, 101 Ill. 206; *Thompson v. Waters*, 25 Mich. 214. In the last case, *CHRISTIANCY, C. J.*, said: "The legislature are the proper representatives of the public interest, and having the exclusive power to determine what shall be the public policy of the State, if they have chosen to make no enactment upon the subject it is natural to infer they omitted to do so because they thought it unnecessary and that the generally recognized principles would be sufficient for such cases." The fact that the legislature has itself created no corporation with power to do the act is not enough to prove that it is against public policy for a foreign corporation to do it. *Cowell v. Springs Co.*, 100 U. S. 55; *Deringer v. Deringer*, 5 Houst. 416; but see *Empire Mills v. Alston Grocery Co.*, 4 Wills. (Tex.) 346, 15 S. W. 505. In acting within the State, the foreign corporation is, of course, at all times subject to the regulations and to the general laws of the State. *U. S. v. Fox*, 94 U. S. 315; *McGregor v. Erie Ry.*, 35 N. J. L. 115; *Southern L. Ins. & Tr. Co. v. Packer*, 17 N. Y. 51; *P. v. Coleman*, 135 N. Y. 231. Since a foreign corporation may be excluded from a State altogether, it may be admitted upon terms, as, for instance, that it will submit to the jurisdiction of the local courts. *Paul v. Virginia*, 8 Wall. 168; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727.

The mere fact that the corporation was formed in the foreign State by citizens of the domestic State, to do business solely in the latter State, does not make it incapable of acting. *Bangleman v. National W. W. Co.*, 46 Fed. 4; *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576; *Hanna v. International Petroleum Co.*, 23 Oh. St. 622. But where the legislature, in chartering a corporation to act in other States, forbade it to do any act in the State of charter, it was held incapable of acting in a foreign State. *Land Grant Ry. v. Coffey County*, 6 Kan. 245. *VALENTINE, J.*, said: "No rule of comity will allow one State to spawn corporations and send them forth into other States to be nurtured and do business there, when said first mentioned State will not allow them to do business within its own boundaries."

The corporation can do no act which it is not empowered to do by the State of its charter; no law of the foreign State, permitting such an act to be done by the corpora-

LIVERPOOL INSURANCE CO. v. MASSACHUSETTS.

SUPREME COURT OF THE UNITED STATES. 1870.

[Reported 10 Wallace, 566.]

ERROR to the Supreme Judicial Court of Massachusetts; the case being this:—

A statute of the State just named imposes upon “each fire, marine, and fire and marine insurance company, incorporated or associated under the laws of any government or State other than one of the United States, a tax of 4 per cent upon all premiums charged or received on contracts made in this Commonwealth for insurance of property.” The same statute imposes a tax of but 2 per cent upon such premiums when the company is incorporated under the laws of any one of the United States other than Massachusetts; upon which premiums, where the company is incorporated by itself, it imposes but 1 per cent; while no tax is imposed by the laws of the State upon the business of insurances transacted by any natural persons citizens of the same.

With the enactment just mentioned on its statute-book, the State of Massachusetts, in 1868, filed a bill in its Supreme Judicial Court against the Liverpool and London Life and Fire Insurance Company (a company doing a large business in that State), to collect a tax of 4 per cent on its premiums upon contracts made in Massachusetts for insurance of property, and to restrain the company from doing further business till the tax was paid. The company set up that it was not “incorporated” at all, but was an association, under the laws of Great Britain, of natural persons, some of whom were citizens and residents of the country just named; and some citizens and residents of the State of New York; formed for the purpose of conducting the business of insurance under certain deeds of settlement, and having the legal character of a partnership; that accordingly it could not be

tion within its territories, can confer the power to do it. *St. Louis V. & T. H. R. R. v. T. H. & I. R. R.*, 145 U. S. 393. As its powers are created, so the continuance of them is dependent on the will of the State of charter (subject to possible constitutional limitations). If the powers of a corporation are altered in that State, the effect of the alteration is felt wherever the corporation acts. *Canadian So. R. R. v. Gebhard*, 109 U. S. 527; *Relfe v. Rundle*, 103 U. S. 222. Therefore the existence of a corporation is determined solely by the law of the State of charter: *Importing and Exporting Co. v. Locke*, 50 Ala. 332; and if by that law the corporation has come to an end, it ceases to exist everywhere: *Remington v. Samana Bay Co.*, 140 Mass. 494. In the latter case

HOLMES, J., said: “Would it not be a most extraordinary spectacle if, when a *de facto* government . . . had made a decree dissolving a corporation, and its decree had been accepted as valid by all succeeding governments of the country having exclusive power and jurisdiction over the matter, the courts of another State should undertake to assert that the corporation existed under the laws of that country, in spite of their repudiation and denial? . . . That fiction or artificial creation is wholly within the power of its creator, and persons who deal with it must be taken to understand that it is so.” — ED.

taxed as a "company incorporated under the laws of any government or State other than one of the United States;" while, in so far as the discriminating tax of 4 per cent was sought to be laid against it as a company associated simply and not incorporated, it violated, in regard to the members of the company who were subjects of Great Britain, a provision in the treaty of 1815, between that country and the United States, by which it is agreed that the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce; and — in regard to the citizens of New York, that provision in section 2, article 4, of the Federal Constitution, which secures to the citizens of each State all the privileges and immunities of citizens in the several States.¹

MILLER, J. The case of *Paul v. Virginia*, 8 Wall. 168, decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one State, having an agency by which it conducted that business in another State, was not engaged in commerce between the States.

It was also held in that case that a corporation was not a citizen within the meaning of that clause of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and that a corporation created by a State could exercise none of the functions or privileges conferred by its charter in any other State of the Union, except by the comity and consent of the latter.

These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recog-

¹ Part of the statement of facts and the arguments of counsel are omitted. — ED.

nized by the act of Parliament which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, etc., and the demand for the use of corporate powers in combining the capital and the energy required to conduct these large operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized, and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the States of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the States of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed in all the States the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legislative ratification as is given by the acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So also it is said that the fact that there is no provision either in the deed of settlement or the act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

MR. JUSTICE BRADLEY. Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a corporation. I think it is one of those special partnerships which are called joint-stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the States from imposing taxes or license laws upon either British corporations or joint-stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares.

*Judgment affirmed.*¹

¹ *Acc. General S. N. Co. v. Guillou*, 11 M. & W. 877. — Ed.

CHAPTER XII.

PROPERTY.

WATERS v. BARTON.

SUPREME COURT OF TENNESSEE. 1860.

[Reported 1 Coldwell, 450.]

McKINNEY, J. The complainant, Elizabeth, is the only child of David A. Barton, who died in Texas, in December, 1844, leaving the complainant, his only distributee, then an infant of about eleven months old.

This bill was filed originally, in the name of her next friend, to recover two slaves, named Henry and Mack, claimed to have been the property of said D. A. Barton, who died intestate.

The allegations and proof, in regard to the ownership of said slaves, by David A. Barton, is contradictory. For the complainants, it is alleged that Joshua Barton, the father of David A., made a parol gift of the slaves to him. The defendants deny the gift, and allege that the slaves were merely loaned by the father to his son, for the period of two years, at the expiration of which time they were to be returned.

The proof shows, that in September, 1842, the intestate, David A., whose residence was in Texas, was on a visit to his father's family, who resided in Cannon County, Tennessee, and that, about to return home, Joshua Barton, his father, placed said two slaves in his possession, to take with him to Texas; that he did take them with him to his home, in Texas, where he arrived about the 15th of October, 1842; and that he retained possession of the slaves, and claimed them as his own property, from that date until his death, which happened on the 20th December, 1844, being a period of more than two years; and that after his death, they came into the possession of the administrator of his estate, who delivered them into the custody of the guardian of the complainant, with whom they remained until November, 1845, when by the procurement of Joshua Barton, they were enticed away and brought to Tennessee, and taken possession of by Joshua Barton, who claimed them as his property; and who, shortly afterwards, delivered the slave, Mack, into the possession of his son-in-law, the defendant, Ramsey, who still has him in his possession; and at a

later period, he disposed of Henry, to his son, the defendant, William, who still retains him.

Joshua Barton died in the spring of 1858; the defendant, William, is the personal representative of his estate, and the other defendants are the legatees and devisees under his will.

We do not deem it necessary to comment upon the conflicting testimony, in detail, with the view of sustaining our conclusion as to its effect. Suffice it to say, that upon a review of all the evidence, and more especially the declarations of Joshua Barton, as proved by Stokes and Farmer, at the time the slaves were brought back from Texas, in November, 1845, the preponderance of the proof, in our opinion, is, that the transaction was a gift, and not a loan, of the slaves, by Joshua Barton, to his son, David A.

This brings us to the question of law, arising upon the facts stated; namely: Whether or not, under the Statute of Limitations of Texas, David A. Barton acquired such a title to the slaves as will entitle the complainants, suing in his right, to recover them in the courts of this State.

By the Statute of Texas, suit must be commenced, in a case like this present, "within two years, next after the cause of such action, or suit, and not after." See Hartley's Dig., Art. 2377; and this statute "applies no less to foreign than to domestic claims." *Ib.*, Art. 2398.

In the construction of this statute, it has been declared by the Supreme Court of that State, that its effect is, not only to bar the rights of action of the former owner, but also to extinguish his right; and to vest the right of property absolutely in the adverse possession, so that if, after the bar had been completed, the former owner should regain the possession, the possessor might maintain an action against him for the recovery of the property. See 9 Tex. Rep. 123.

For the defendants, it is insisted, that, inasmuch as by the statute of this State, where the suit is brought, an adverse possession of three years is required to give title, under a void parol gift of slaves, our own law, and not that of Texas, must govern the decision of the case.

The counsel on both sides refer to Story's Conflict of Laws, § 582; but they differ in their understanding of the import of that authority.

The counsel for the defendants admit that if both parties had been resident within the jurisdiction of Texas, during the whole period prescribed by the law of that State, to complete the bar, the title thus acquired by the possessor might be set up by the complainants, in our courts, in the present case, and a recovery of the slaves be effected by force thereof.

But, forasmuch as Joshua Barton was a resident of Tennessee, and not subject to the jurisdiction or laws of Texas, during the period the slaves were in adverse possession of David A. Barton, in that State, it is denied that any such effect can be predicated of the statute of that State. Mr. Story put this case: Suppose personal property is adversely held in a State, for a period beyond that prescribed by the laws of that

State ; and after that period has elapsed, the possessor should remove into another State, which has a longer period of prescription, or is without any prescription, could the original owner assert a title there against the possessor, whose title, by the local law, and the lapse of time, had become final and conclusive before the removal? It has certainly been thought, says the author, that, in such a case, the title of the possessor cannot be impugned. See section 582 and cases referred to in note 2.

The case supposed above, as we understand the author, is, in principle, precisely the present case. Every sovereignty possesses the undoubted power to regulate the rights of property situate within its own jurisdiction.

It may limit all rights of action to certain prescribed periods, and may ordain that, after the expiration of the periods thus prescribed, not only the right of action, but the claim or title likewise, shall be extinguished.

And if a positive title to property be then acquired and perfected by the local law of the place, where situate at the time, upon what sound principle can it be maintained that such title can be effected or defeated by the removal of the property to another country, by the possessor, or by its removal by another, without his consent?

In such a case, can it be material whether or not the former owner was resident within the jurisdiction, by whose local law the possessor had become vested with an absolute title to the property? If it be said that the former owner, by residing within the jurisdiction, during the period prescribed, voluntarily subjected himself to the operation of the local laws of the place, and therefore cannot complain that his right is taken away by those laws, as the result of his own laches, may it not be said with quite as much reason, and force of argument, that, by knowingly suffering his property to be taken, and to remain within the jurisdiction, during the period prescribed by the local law, he thereby voluntarily subjected his property and rights to the operation of such local laws?

In the latter case, as much as in the former, the loss of his right is the result of his own laches.

Our conclusion, therefore, is, that under the law of Texas, the title of Joshua Barton — though not a resident of that State — was extinguished, and the title perfected in David A. Barton ; and that the title thus acquired may be set up by the complainants, in the courts of this State, against those claiming the slaves, by the subsequent disposition of them made by Joshua Barton.

*Decree affirmed.*¹

¹ *Acc.* *Shelby v. Guy*, 11 Wheat. 361 ; *Rabun v. Rabun*, 15 La. Ann. 471 ; *Sessions v. Little*, 9 N. H. 271 ; *Sleeper v. Pa. R. R.*, 100 Pa. 259. — *Ed.*

POND v. COOK.

SUPREME COURT OF ERRORS, CONNECTICUT. 1877.

[Reported 45 Connecticut, 126.]

PARK, C. J. The defendant was appointed a receiver of the insolvent Watson Manufacturing Company by the court in the State of New Jersey where the company was incorporated and its assets were located. The defendant under his appointment took possession of the property and assets of the company, and as receiver purchased the iron in question in this case, and had it prepared for the construction of a bridge between the towns of New Haven and Orange in this State. The iron was thus prepared in the State of New Jersey, whence he had it shipped to New Haven to his address as receiver. The Watson Manufacturing Company had previously made a contract with the towns of New Haven and Orange for the construction of the bridge, and what the defendant did was done to carry out and complete the contract, for the benefit of the creditors of the company.

Thus it appears that the property was in the possession of the defendant as receiver when it came into this State. He was invested with it, and was legitimately performing the duties of his appointment in completing the contract by its use when it was attached by the plaintiff. In these circumstances comity among the States requires that the case should be regarded by our courts precisely as it would have been by the courts of New Jersey if the controversy had arisen there. In the case of *Wales v. Alden*, 22 Pick. 245, an inhabitant of Boston being in New York, an assignment of goods and choses in action was made to him in trust for the benefit of the creditors of the assignors, who were inhabitants of New York. The trustee took possession of the property in New York, but did not move it out of the State. On his return to Boston he was served with process of garnishment by a creditor of the assignors living in Massachusetts. The claim of the creditor was based upon the assignment in New York. He insisted that by the maxim of law personal property follows the person, and that consequently the property assigned was with the trustee in Massachusetts; and that inasmuch as the assignment was made under the laws of New York, which had no effect in Massachusetts, he had obtained the prior right by his attachment. The court, in commenting upon this claim of the creditor, said: "The trustee took the goods for a lawful purpose, and by a title indefeasible where the transaction took place, and under the laws of New York, to which he was amenable. He was bound, as well in conscience as by law, to execute the trust according to the terms of the conveyance under which he took the property. His coming into this commonwealth ought not to defeat such a conveyance, and discharge him from his legal and conscientious obligations, even though it should be held

that, if such an assignment had been made here, it could not hold against attaching creditors." In the case of *Clark v. The Connecticut Peat Company*, 35 Conn. 303, a debt was attached in this State which was owed to creditors in Massachusetts, but which had previously been assigned in that State to a party residing there, and it was held that the assignment, being good by the law of Massachusetts, was good against the attaching creditor. Judge Hinman, in giving the opinion of the court, said: "If by the law of Massachusetts the plaintiff acquired a valid title as assignee of this debt by the assignment before the attachment here, how can that attachment in any way affect that title? When a legal title is once vested by a sale valid in the place where made, its validity should be recognized everywhere." See also *Mead v. Dayton*, 28 Conn. 33, and *Koster v. Merritt*, 32 Conn. 246.

But it is said that in the case at bar the receiver was appointed by the court in New Jersey, in conformity with the local law of the State, which had no authority beyond the limits of the State, and that consequently when the property came here it came free from all the right and title which the receiver had to it while it remained in the State of New Jersey. There would be force in this claim if the property was here when the receiver was appointed in New Jersey, and the receiver had never taken possession of it previous to the attachment by the plaintiff. In that case the local law of New Jersey could not vest property in the receiver which was located here. *Upton v. Hubbard*, 28 Conn. 274; *Paine v. Lester*, 44 Conn. 196; *Taylor v. Columbian Ins. Co.*, 14 Allen, 353; *Willits v. Waite*, 25 New York, 577. And many other cases might be cited to the same effect. But when property has once vested in a trustee, assignee, or receiver, by the law of the State where the property is situated, it makes no difference whether it is done under the local law of the State or under the common law. The law of another State will not divest the trustee, assignee, or receiver of his right to the property, should he take it into such State in the performance of his duty. The courts of such State will inquire whether he has such right to the property when it comes into the State as between himself and their own citizens, but when the fact that he has such right is ascertained they will not regard it as important by what mode the right was acquired. In the case of *Crapo v. Kelly*, 16 Wall. 610, where personal property located in Massachusetts was transferred to an assignee by proceedings in insolvency under the local laws of that State, and the property afterwards being in New York was attached by a creditor of the insolvent residing there, it was held that the assignee had the prior right to the property. The case had been previously decided by the Court of Appeals in the State of New York. 45 New York, 86. Although the court came to a different result from the decision in *Wallace*, still the two courts harmonized, so far as the law under consideration is concerned. The only difference between that case and the one at bar consists in the fact that an assignee was appointed

in that case and a receiver in this. The case cited from the 22 Pickering scarcely differs from the present in any other respect. The court would not allow the fiction of law, everywhere established, and in no State more than in Massachusetts, that personal property follows the person, to give a preference to the attaching creditor. But the object to be accomplished by the appointment of an assignee in those cases, and a receiver in this, was the same. Each was appointed to settle the estate and divide the property among the creditors of the insolvent. Calling the administrator of the estate in such cases by different names does not alter his character or the nature of his duties. A receiver, appointed under the statute of New York, directing proceeding against insolvent corporations, is a standing assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. 4 Paige, 224. One of the modes in the State of New Jersey to settle the insolvent estate of a corporation, under their statute, is by the appointment of a receiver. And whether the title to the property in such case passes to the receiver or remains technically with the corporation, is a matter of no importance, so long as the property is taken from the corporation, and placed in the hands of the receiver, with full power, under the direction of the court, to settle the estate of the corporation. The plaintiff refers us to High on Receivers, and insists that a receiver has only the custody of the property committed to his keeping. But the author, in the references cited, is merely treating of receivers appointed *pendente lite*, under the ordinary powers of a court of chancery. Such references throw no light upon the pending question.

The statute of New Jersey under which this receiver was appointed authorizes proceedings against insolvent corporations, like the Watson Manufacturing Company, to settle their estates by dividing their property among their creditors in a similar manner to other insolvent statutes in other States where trustees are appointed. Obviously, in the State of New Jersey the property in question could not have been taken from the receiver by a creditor of the corporation; and we think it should not be done here. We think the case should be treated here precisely as it would have been by the courts of New Jersey if the controversy had arisen there.

The only remaining question to be considered is, whether the defendants have made full defence in the pending case. We think the cases of Clark v. Gaylord, 24 Conn. 484, Fitch v. Chapman, 28 Conn. 257, and Dayton v. Merritt, 33 Conn. 184, are decisive of this question in favor of the defendants, and further comment in regard to it is unnecessary.

We advise judgment in favor of the defendants.

In this opinion the other judges concurred.¹

¹ Acc. Chicago M. & S. P. Ry. v. Packet Co., 108 Ill. 317; Cagill v. Wooldridge, 8 Baxt. 580. — Ed.

EDGERLY v. BUSH.

COURT OF APPEALS, NEW YORK. 1880.

[*Reported 81 New York, 199.*]

THIS action was brought for the alleged conversion of a span of horses.

The facts, as found by the referee, are as follows :—

One Stephen Baker was born in Lower Canada and resided there till 1873. In that year he went to Moriah, in New York, engaged there in business and resided there. While a resident of Moriah he executed to the plaintiff, a resident also of Moriah, on the 9th day of March, 1875, a chattel mortgage on property including the span of horses in question. This mortgage was duly filed March 10, 1875. The sum was payable in monthly instalments, the first payment to be made June 1, 1875. The mortgage contained a clause that in case of non-payment, or in case the mortgagor or any other person should remove, secrete, or dispose of the property, or if the mortgagee deemed it necessary, he might take possession, otherwise the property was to remain in the mortgagor's possession until the time for the first payment. No part of the sum secured has ever been paid. On the 10th of May, 1875, Baker returned to Lower Canada, taking the property with him, and there he has resided ever since. In November, 1875, at St. Jean Chrysostom, in Lower Canada, one Francis De Lisle, of that place, a regular trader, dealing in horses, sold the horses in question to one Bromley, a resident of Plattsburgh, in this State. Bromley made the purchase in good faith and in ignorance of the plaintiff's claim. The horses were in De Lisle's possession at the time and were at once delivered to Bromley and immediately brought by him to Plattsburgh. It does not appear how the horses came into the possession of De Lisle. On the 10th of December, 1875, Bromley learned that the plaintiff claimed to have a mortgage on the horses. To prevent their seizure, by the plaintiff, he immediately removed them to Canada for the purpose of trading back with De Lisle. On the 13th of December, 1875, in Canada, Bromley sold the horses to the defendant. At that time the defendant was a resident of this State. The horses in question remained in Canada, and since then they had not been brought into this State up to the time when this action was commenced. The defendant was informed by Bromley that he had run the horses into Canada to avoid a claim or seizure under a mortgage. Plaintiff made a demand for the horses but defendant refused to deliver. Plaintiff did not reimburse, or offer to reimburse to defendant, the amount paid by him or by Bromley for the horses. Under the laws of Lower Canada, if an article of personal property, lost or stolen, be sold in a fair or market, or at a public sale, or purchased from a trader dealing in similar articles, the owner can-

not reclaim it without reimbursing to the purchaser the price paid by him.¹

FOLGER, C. J. This is an action for the conversion of chattels. It is clear that if the plaintiff had the title to them, or the right to take immediate possession of them, the defendant exerted such dominion over them as was in law a conversion of them. It is also clear that the plaintiff had the title to the property by the laws of this State, and the right to the immediate possession of it.

The defendant must make his defence, if he may at all, upon a title got by Bromley from De Lisle, to which he has succeeded. De Lisle was a resident of Canada, and a trader dealing in articles like the property in contest, and had actual possession of this property there as the proprietor of it. Bromley bought it of him in good faith, gave value for it, and had not actual notice of the plaintiff's right to it. The plaintiff has never reimbursed to Bromley or to the defendant the price paid for it by Bromley, nor has he offered so to do.

We think that these facts make a title in Bromley that the law of Lower Canada would uphold in that jurisdiction. We deem it unnecessary to go into the detail of the interpretation. The question remaining is, which law is to prevail in determining this contest — that of Lower Canada, or that of this State?

We take note that the plaintiff, and Baker from whom the plaintiff got title, were residents of this State when the transfer was made between them; that it was a transfer of property which was then here, whence it was taken without the consent of the plaintiff; that the transfer was made by mutual consent, and was executed and valid here; that the consideration for the transfer existed and passed here; that the plaintiff and defendant were and are residents of this State; and that the forum in which they stand is here. Thus the law of the domicile, and the law of the then situs of the property, and the law of the forum in which the remedy is sought, all concur to sustain the right of the plaintiff. The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him. By that law, as it exists in this case, the plaintiff became the owner of this property before it was taken beyond its operation. By that law, too, an owner of property may not be divested of it without his consent, or by due process of law; plainly not by a dealing with it by others without his knowledge, assent, or procurement. Still, another State may make provision by statute in respect to personal property actually within its jurisdiction. Though a transfer of personal property, valid by the law of the domicile, is valid everywhere as a general principle, there is to be excepted that territory in which it is situated and where a different law has been set up, when it is necessary for the purpose of justice that the actual situs of the thing be examined. *Green v. Van Buskirk*, 7 Wall. 139. Yet the statutes of that land have no extraterritorial force *proprio vigore*, though often permitted

¹ Arguments of counsel are omitted. — Ed.

by comity to operate in another State for the promotion of justice, where neither the State nor its citizens will suffer any inconvenience from the application of them. The exercise of comity in admitting or restraining the application of the laws of another country must rest in sound judicial discretion, dictated by the circumstances of the case. Per Parker, Ch. J., *Blanchard v. Russell*, 13 Mass. 6. It is plain that on no principle applicable to this case could the sale of the plaintiff's property by another having no authority from him, to his wrong indeed, be upheld, save that it was authorized by the statute of Lower Canada. So that the question is one entirely of the comity to be shown by the courts of this State to the enactments of another country. Those statutes not only enact the rule of market-overt as it prevails in general in England, but carry it further, and make, as in the city of London, every sale by a trader dealing in like articles as good as a sale at market-overt.

That rule does not obtain in this State. It has not been our policy to establish it. Our policy has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets a good title. It would be to the contravention of that policy, and to the inconvenience of our citizens, if we should give effect to the statutes of Lower Canada, to the divesting of titles to movables lawfully acquired and held by our general and statute law, without the assent or intervention, and against the will of the owner by our law. Notions of property are slight, when a *bona fide* purchase of stolen goods gives a good title against the original owner. Per Kent, Ch. J., *Wheelwright v. Depeyster*, 1 Johns. 470. We are not required to show comity to that extent, especially as it is to our citizens alone that we are administering justice.

There are judgments to the end that the law of the situs of the movable property will determine who is entitled to it, and the matter of comity is not taken into account. A notable one is *Camnell v. Sewell*, in the Exchequer Chamber, 5 H. & N. 728. But there the property had not been in England until after the sale in Norway, and had never been in the possession of the English owners. We doubt whether, in a case like this, where, after a title to property has been acquired by the law of the domicile of the vendor, and of the situs of the thing, and of the forum in which the parties stand, in a contest between citizens of the State of that forum, it has ever been adjudged that such title has been divested by the surreptitious removal of the thing into another State, and a sale of it there under different laws. There are decisions that it has not, however. See *Taylor v. Boardman*, 25 Vt. 581; *Martin v. Hill*, 12 Barb. 631; *French v. Hall*, 9 N. H. 137; *Langworthy v. Little*, 12 Cush. 109. It is sought to distinguish these cases from that in hand; but they went upon a principle that is not inapplicable here. In them, as here, a right to movable property had been acquired in one State in a mode efficient thereto by its laws. The property had been taken into another State where that mode was not sufficient by its law to create a right. But the right acquired by that

mode was upheld. In all the cases the property was taken away from under the laws which gave the right, and placed under the operation of laws that denied the right. We perceive no difference in those cases from this that we have, save that in those a creditor was seeking to recover his debt out of the property, *in invitum* the right thus acquired. Here there is a sale of the property between third parties despite the right. In those it was sought to take away the right by a public judicial sale. In this it is urged that the right has been destroyed by a private sale. By the laws of those other States the creditors would have succeeded. So here the third parties would succeed by the law of Lower Canada. But in those cases the law of the State where the right was acquired was recognized, and force given to it in another State, and under different law. Why should it not be in this case?

Such cases as *Cranch v. McLachlin*, 4 Johns. 34, and *The Helena*, 4 Rob. Ad. 3, do not conflict. In them there were in the foreign country legal proceedings *in rem*, or analogous thereto, so that the question was of respect for the judicial proceedings of another country. The case of *Greenwood v. Curtis*, 6 Mass. 358, recognized the principles upon which our judgment proceeds, but held that the facts did not call for the application of them.

The order of the General Term should be reversed, and judgment on report of the referee be affirmed.

All concur, except RAPALLO, J., not voting.

*Order reversed and judgment affirmed.*¹

DAMMERT v. OSBORN.

COURT OF APPEALS, NEW YORK. 1893.

[Reported 140 *New York*, 30.]

O'BRIEN, J.² José Sevilla, residing and domiciled at Lima, in the republic of Peru, died there on the 9th of December, 1886, having made and published his last will and testament, bearing date July 2, 1885, by which he disposed of a large estate, consisting mostly of personal property, a considerable portion of which, or the evidences thereof, was at the time of his death actually within this State. The will was duly proved and established under the usual and proper judicial proceedings in the courts of the country where the testator was domiciled, having by law jurisdiction in such cases, and executors appointed pursuant to its provisions. These executors, residing in Peru, together with the appointed heirs and residuary legatees, caused the will or a copy thereof to be recorded in the office of the surrogate

¹ Followed, *Wylie v. Speyer*, 62 How. Pr. 107. And see *Todd v. Armour*, 19 Scot. L. R. 656. — ED.

² Part of the opinion only is given. — ED.

of New York, and thereupon, with their assent and upon their motion, the plaintiffs were appointed ancillary executors in this State, and having qualified and entered upon the duties of the trust, took into their possession the personal estate here. The single provision of the will out of which the questions arise which are involved in this appeal, is a charitable bequest for the education of poor female children in the city of New York.

The several clauses by means of which the testator sought to accomplish this purpose are quite elaborate and formal, and their substance and effect will be sufficient to give a clear view of the general purpose, as well as the mode in which it was to be executed. The testator states in the will that in the previous year, 1884, he executed a will by which he left the larger part of his fortune to found an institution in New York under the name of "The Sevilla Home for Children," and in which he formulated the details of support and management, but in view of the unfortunate situation of his relatives and various persons dear to him, he deemed it necessary to reconcile this desire with his duties to his family. He then proceeds to declare that it is his will that there be established in the city of New York, and permanently maintained, an institution to be known as the "Sevilla Home for Children," to be managed by his executors and a board of philanthropic managers, and devoted to the education of poor female children.

He directed that in all matters relating to the institution a prudent economy be observed; that the buildings be adequate to the end to be attained, constructed to receive from fifty to one hundred children and the teachers required, the land to be purchased and buildings erected at moderate prices. The managers were empowered to make rules for the government of the institution in the best manner, not forgetting the following conditions: (1) Only very poor children, from five to ten years of age, fit for apprenticeship and free from ailments, were to be admitted, to remain in the home until they attained the age of sixteen. (2) The food and clothing to be economical and suitable, and the latter to be of uniform pattern and color for all. (3) The instruction to be primary and upon the basis of a moral education with directions as to the practical branches to be taught. (4) Day scholars to be admitted providing they did not occasion expense, to be kept apart from the boarders in order to preserve the moral tone. He then gives directions for investing any money earned by the children, whenever that was possible, one-half to be paid to them at sixteen, and the other half devoted to the support of the school. The number of children to be always subordinate to the resources, preference to be given to natives of Peru, upon the recommendation of Peruvian consuls at New York or the place where application was made. The fitness of the children being proved, the managers could not, within the limit as to numbers, refuse them admission for any motive whatever. The board of philanthropic managers to be composed of seven prominent citizens of the city of New York, to be selected by the surrogate from a list

which the testator named. For the purpose of founding and endowing the institution, five hundred thousand dollars was bequeathed in the securities, constituting his estate, at par, to be delivered to the board by the executors. The board was directed to postpone the purchase of land and construction of buildings for two years after delivery of the securities, in order that the school should be founded with the accumulated interest in that period, without reducing the principal sum for that purpose. The executors and appointed heirs were directed to transmit to the municipality of New York, a copy of the clauses of the will relating to the institution, and the testator requested the municipal authorities to watch over and care for the fulfilment and performance of the will in this regard. The trustees were appointed in conformity with the terms of the will and accepted the trust and have been made defendants in this action. The plaintiffs, as ancillary executors, have possession of the securities devoted by the will to the founding of the home and hold the fund bequeathed, subject to the order and direction of the court. The trustees, or philanthropic managers, as they are designated by the will, applied to the legislature of this State for incorporation, and upon this application chapter 17 of the Laws of 1889 was enacted, by which they and such other persons as they might associate with themselves, in accordance with the provisions of the will, were created with a body corporate and politic under the name and title of the "Sevilla Home for Children." The incorporators were by name declared to be the permanent trustees of the corporation in accordance with the will of the testator, and in case of a vacancy by death, resignation, or otherwise, the survivors were empowered to fill it in accordance with the directions of the will, as near as may be, so that the number should be kept at seven. The trustees were given full power to control and manage the corporation, and for that purpose to make by-laws and appoint such agents and officers as might be deemed necessary, and to fix their tenure of office as well as their own. The corporation was declared to possess all the powers and, except as otherwise provided by the act, to be subject to the provisions of the Revised Statutes. It was expressly empowered and directed to accept and receive the gift bequeathed by the will, upon the terms and conditions there expressed, and power was conferred upon it to enter into any obligation in order to secure compliance with such terms and conditions. In addition to the powers conferred by law upon corporations, it was declared that this corporation should have power and capacity to establish and maintain a home for the education of poor children in the city of New York as provided in the will, and for that purpose to demand and receive the fund bequeathed by the will for that purpose, and to hold, manage, and dispose of the same in such manner as might be best calculated to carry out the objects and purposes indicated by the testator. The trustees accepted the trust under the act of incorporation and organized under it. The will contains various other large bequests to relatives and friends and for charitable

purposes, the validity of which are not involved in this action, and, so far as appears, they are not questioned by any one. In the thirty-sixth clause, the persons are designated by the testator who were empowered to administer the estate and carry out the will, and, in what seems to be the language of Peruvian law, they are called executors and appointed or testamentary heirs, and they were, by the terms of the will, to co-operate with the trustees in founding the institution and administering the gift.

The plaintiffs, in their complaint, state all the facts and ask for the judgment of the court with reference to the disposition of the fund in their hands. The defendants are the trustees named in the will and the corporate body created upon their application and the executors, appointed heirs, and residuary legatees named by the testator. It appears that they were all served, but none of them answered or made any claim to the fund except the corporation known as the Sevilla Home for Children, the trustees and the Sociedad de Beneficiencia de Lima, one of the residuary legatees. The latter is the only party to the action who really disputes the right of the corporation or the trustees to the fund. The will directed that said Sociedad should receive the various legacies of public interest, and should deliver them over to the respective institutions in the will named, and that if any such institutions should decline to receive the same, the legacy to it should pass to said Sociedad.

The learned judge, before whom the cause was tried at the Special Term, held that the bequest for the Sevilla home was void, as contravening the statute of this State against perpetuities and for other reasons, and that none of the defendants were entitled to receive the gift, and he directed that the plaintiffs account for the fund to the executors and appointed heirs in Peru, and to that end that the fund be remitted to that country without determining to whom the beneficial interest in the fund belonged. The General Term has affirmed the judgment, and the Sevilla Home and its individual trustees have appealed to this court.

At every stage of the inquiry pressed upon us by this appeal, it is important to keep in view a fundamental fact, established by uncontradicted evidence at the trial and conceded upon the argument, and that is that the bequest to the Sevilla Home was perfectly valid by the law of Peru, the domicil of the testator, which governed his personal property, wherever it was at the time of his death. The validity of the gift by the law of the domicil necessarily involves the conclusion that it is not affected, under that law, by the fact that at the time of the testator's death there was no trustee competent to take, or that the estate did not vest within a period measured by lives, or by the general and indefinite nature of the trust, nor any other local rule that would defeat the intention of the testator in case it had been a domestic will. The general principle that a disposition of personal property, valid at the domicil of the owner, is valid everywhere is of universal application.

It had its origin in that international comity which was one of the first fruits of civilization, and in this age, when business intercourse and the process of accumulating property take but little notice of boundary lines, the practical wisdom and justice of the rule is more apparent than ever. It would be contrary to the principles of common justice and right upon which the rule is founded, to permit a testamentary disposition of personal property, valid by the law of the domicil, to be annulled or questioned in every other country where jurisdiction was obtained over the property disposed of or the parties claiming it, except for the gravest reasons. There are, no doubt, some exceptions to the rule founded upon considerations of public policy and necessity. Foreign contracts or dispositions of property which, if carried out, would endanger the public morals or the public safety, or undermine the political or social fabric, or subvert the administration of justice, or had other evil tendencies, are not within the rule, as the right and duty of self-preservation is higher and stronger in every community than any obligation founded in comity.

But the object of this bequest, instead of tending to such results, was highly laudable and commendable, and certainly there is no public policy that forbids its execution. The law allows and in every proper way encourages such gifts, and sustains them, when capable of execution, and even when they are not, it does not hold them void, if valid under the law of the domicil, and it is only in cases where there is no adequate legal regulation for administering or carrying them into effect, that the property will be remitted to the government of the domicil for administration. None of the parties in this case have acquired any title to the fund in question that they are not given by the law of Peru. Our courts may in certain cases decline to administer the gift, and remit the property to the principal seat of administration, but they cannot divest the title of one or transfer it to another contrary to the law of the domicil. That law is part of the disposition and the foundation of all title under it, and it cannot be disregarded to the prejudice of one and the benefit of another any more than the other parts of the instrument. There is no law that forbids gifts to charity here by testators in other countries, or that requires us to reject the gift unless it is made, in all respects, in conformity with our local law. There is no public policy on that subject except what is to be found in the language of the statute, and that provides that "the absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator." 2 R. S. 6th ed. p. 1167.

When that statute was passed it was not within the legislative purpose to interdict dispositions made in other countries to take effect here. There is nothing in the language used that indicates such a pur-

pose. There are other statutes that invalidate testamentary gifts to certain corporations unless made within a certain time before death where the testator had wife, children, or parents. The purpose of these statutes is evident. They were intended to prevent improvident and hasty bequests to the prejudice or neglect of those natural obligations which the law also imposes upon the citizen. But these restraints applied to members of the political community from which the law emanated and not to persons in other countries where no such restrictions existed, and who desired to give according to their own laws. Bequests by such persons to those corporations, without regarding the statutes referred to, would be good if valid at the domicile of the testator. *Hollis v. Drew Theo. Seminary*, 95 N. Y. 171. It is no part of our public policy to condemn such gifts to charitable or benevolent corporations here. Our law permits the citizens or subjects of other countries to dispense charity here in such measure as they wish and according to such methods as their own laws prescribe. The policy that dictated our statutes against perpetuities and accumulations did not anticipate any danger from abroad, and our recent decisions are to the effect that they are local in their general scope and effect. *Cross v. U. S. Trust Co.*, 131 N. Y. 330; *Hope v. Brewer*, 136 N. Y. 126.

In the first case cited we held that a testamentary disposition of personal property in trust, by a person domiciled in another State, valid by the law of the domicile, though in some respects contrary to our statute, was not void, and we refused to annul the will of the testator that had taken effect and been acted upon here for many years. In the second case we refused to interfere with a testamentary disposition in a domestic will, containing a trust for a charity in a foreign country, where it was valid and capable of being executed and enforced, although perhaps under our law the beneficiaries were not sufficiently defined and it may have been open to other objections. The trend of these cases is unquestionably towards the conclusion that our statutes apply to domestic wills that by their provisions are to be executed here. An accumulation to take effect in another country or a bequest made there to take effect here was not within the intention of the legislature when these statutes were framed. There is, however, this clear distinction between the cases cited and the one at bar. In the former we were not asked to aid in any way the execution of the will or the administration of the trust, but to declare it void at the suit of heirs or next of kin. The parties who stood upon the dispositions of the will simply asked us to allow them to execute the testator's purpose with respect to his property and to manage their own business in their own way. But in this case we are asked, virtually, to put the Sevilla Home in possession and control of the fund and thus give active aid and assistance in the enforcement of a trust, which, in a domestic will, would doubtless be void, and therein is the real difficulty which the situation presents. The objection to this relief, which, under ordinary circum-

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stances, might be formidable, has been, we think, greatly obviated, if not entirely removed, by the legislation which has been enacted since the death of the testator. That has a much broader scope and operation than the mere creation of a corporate body. It is an expression of the will of the supreme legislative power that the gift in question should be received and administered in the manner and for the objects designated in the will, as near as may be, and thus every existing legal obstacle to the execution of the testator's purpose must be deemed to have been suspended or *pro tanto* repealed. The legislature in effect said that, notwithstanding the indefinite nature of the trust, if it was indefinite, or the circumstance that the testator did not appoint a trustee competent to take, or that the absolute ownership was suspended for a period not measured by lives, this gift shall take effect, according to the intention of the donor, and be administered by a corporate body of its own creation. The legislature had the power to so enact unless, in the meantime, the title or beneficial interest had vested in heirs, next of kin or legatees, and, as under the law of the domicile, it did not, the power of the legislature to accept a gift that was awaiting a competent trustee to administer it, cannot well be doubted. It is not important to ascertain or decide where the title to the fund was lodged in the meantime. It was wherever the law of Peru placed it. Whether in the executors, for the purpose of delivering it to the trustees, or in abeyance, it matters not. So long as that law would not permit it to vest in any other person, or for any other purpose, no property right was violated by the legislation. Had the title vested elsewhere, in the meantime, in consequence of the invalidity of the bequest, or for any reason, of course that title could not be disturbed by the legislature. But by force of the law of the domicile upon the facts disclosed by the record, if the fund should be remitted to the executors in Peru, pursuant to the judgment, they would, in the discharge of the trust imposed upon them by the testator, be bound to pay it over to the Sevilla Home for the purpose declared in the will, as the legislature had, subsequent to the death of their testator, created a competent body to execute that purpose without affecting any private right. The necessity or expense of such circumlocution is not perceived. Generally whatever the law will permit to be done indirectly may be done directly.

There is another and more recent statute that has some application to this case, as it is the last expression of the legislative will on the subject, and discloses what our public policy is with regard to such bequests. By chapter 701 of the Laws of 1893, entitled "An act to regulate gifts for charitable purposes," it is enacted that no such gift, when valid in other respects under the law of this State, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries in the instrument creating the same. That in such cases when a trustee is named the title shall vest in him, and if no person is named as trustee, then the title shall vest

in the Supreme Court, and in all cases of bequests to charitable uses, where the beneficiaries are not definitely designated, that court shall have full control, and it shall be the duty of the attorney-general to enforce the trust and represent the beneficiaries. This statute indicates an intention on the part of the legislature to enforce and uphold charitable bequests not heretofore recognized as valid, and it may be regarded as the first step in the direction of modifying that body of law which this court has built up on the ruins of the system outlined in *Williams v. Williams*, 8 N. Y. 525.

The result which the second division of this court was constrained to reach in a recent case of public importance, no doubt had some influence in creating the sentiment which is embodied in the law. *Tilden v. Green*, 130 N. Y. 29.

It seems to be assumed, on the part of the respondents, that these statutes can have no application to this case, inasmuch as they were not enacted until after the testator's death. That would be so had the property vested otherwise than for the purpose of founding the home; but as it did not under the law of the domicile it could not under the law of the forum. When a court of equity obtains jurisdiction and all the facts are before it by supplemental pleading, as they are here, it may and generally does adapt the relief to the situation existing at the close of the litigation. *Peck v. Goodberlett*, 109 N. Y. 181; *Mad. Ave. Bap. Ch. v. Oliver St. Bap. Ch.*, 73 N. Y. 83.

The case turned in the court below upon the views of public policy with respect to the enforcement of the donor's will, but what that policy actually is should be determined by the situation existing at the time the court is required to make its decree disposing of the fund, and the statutes referred to have an important bearing upon that question. . . .

The judgment should be reversed, and final judgment directed in favor of the Sevilla Home for Children, with costs to all parties, as awarded by the courts below, and to the plaintiffs in this court, payable out of the fund.

All concur.

*Judgment accordingly.*¹

¹ *Acc. Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636; *Crum v. Bliss*, 47 Conn. 592; *Fellows v. Miner*, 119 Mass. 541; *Healey v. Reed*, 153 Mass. 197, 26 N. E. 404. — Ed.

CHAPTER XIII.

INHERITANCE.

CAMPBELL v. TOUSEY.

SUPREME COURT, NEW YORK. 1827.

[Reported 7 Cowen, 64.]

ASSUMPSIT for money lent to the testator of the defendant. Pleas: (1) *Non assumpsit*; (2) *Ne unques executor*; (5) *No assets*. The plaintiff on the trial proved his claim to \$94.42, and that the defendant's testator resided and died in Pennsylvania in 1823. He also proved assets to about \$700, which the defendant had received in Pennsylvania and brought from that State to this; and that he had received a certain amount in this State. The defendant proved that he was appointed executor by the will of Booth, and had taken out letters testamentary in Pennsylvania. The judge charged the jury that the defendant was liable as executor for all the assets he still retained in his hands, or had expended or disposed of here, unless in the due course of administration, whether they were received here or brought from Pennsylvania. That his appointment as executor in that State would not, *per se*, protect him; but he must show also that the assets received by him there and here had been disposed of under that appointment, or in the payment of Booth's debts in this State. Having failed to do either, he was liable as executor, *de son tort*, to the amount of the plaintiff's claim, if the assets in his hands amounted to so much. Verdict for the plaintiff for \$94.42.¹

SUTHERLAND, J. The testator resided and died in Pennsylvania, and there the will was proved. The defendant received assets of the estate in Pennsylvania, and brought them with him into this State. He also in this State received debts due to the testator to a considerable amount. The judge charged the jury that the defendant was liable for all the assets which he still retained in his hands, or which he had expended or disposed of in this State, unless in the due course of administration, whether they were received in this State or originally received in Pennsylvania and brought from there here. That the fact

¹ The statement of facts is slightly condensed. Arguments of counsel and part of the opinion are omitted. — ED.

of his having been appointed executor in Pennsylvania would not of itself protect him here; but that it was incumbent on him to show that the assets which he had received in Pennsylvania and brought into this State, as well as those which he had received here, had been disposed of in a due course of administration in Pennsylvania, or in the payment of the debts of the testator in this State. That having failed to do either, he was liable as executor *de son tort* to the amount of those assets.

We see no error in this charge of the judge. If a foreign executor is liable to be sued here, of which we apprehend there can be no question, he must, from the very nature of the case, *prima facie*, be responsible for the assets which are shown to have been in his possession within this State, no matter where they may have been received. And in order to discharge himself from that responsibility, he must show that those assets have been applied in a due course of administration to the payment of the debts of the testator. It is the only way in which an executor, under such circumstances, can be reached. He cannot be compelled to account here, even in relation to the assets received in this State; for having taken no letters of administration here, he is not amenable in that way to any of our courts. He cannot be reached in Pennsylvania, because both his person and the assets are beyond its jurisdiction; and if he is not liable when sued here for the assets received there, he never can be compelled to apply them to the debts of his testator. . . .

The defendant was clearly an executor *de son tort*, and the action was properly brought against him as executor generally. Com. Dig. Administrator, C. 1, 2, 3; Toller's Ex., 17, 369.

It is well settled that if an executor *de son tort* plead *ne unques executor*, as was done in this case, and it be found against him, he shall be charged as any other executor, *de bonis propriis*. Toller, 369.

The motion for a new trial must be denied.

*New trial denied.*¹

JUDY v. KELLEY.

SUPREME COURT, ILLINOIS. 1849.

[Reported 11 Illinois, 211.]

TREAT, C. J.² This is an action of debt, on a judgment recovered in the State of Ohio by Kelley, against the administrators of William Allington. It appears from the record of the proceedings in Ohio that

¹ Statute having done away with executors *de son tort*, it was held that a foreign executor found in New York with assets could not be sued. *Field v. Gibson*, 20 Hun, 274. — Ed.

² Part of the opinion, discussing other questions, is omitted. — Ed.

the suit was there brought against Allington in his lifetime, and service of process had on him. At a succeeding term, the plaintiff suggested the death of Allington, and obtained leave to revive the suit, against his personal representatives. At a subsequent term, the present plaintiffs in error entered their appearance, and pleaded to the action as administrators of Allington; and a trial of the cause resulted in the judgment now the subject of controversy. The presumption from that record is, that the plaintiffs in error obtained letters of administration on the estate of Allington in Ohio. To repel this presumption, the second plea alleges that they were appointed administrators in this State, and that administration was never granted them elsewhere. This presents the question whether a judgment recovered in another State against an administrator appointed in this State can be here enforced against the estate. A grant of administration in one country does not confer on an administrator any title to the property of the intestate situated in another country. He has no authority over, nor is he responsible for any effects of, the estate that may be beyond the jurisdiction. In administering the estate, he acts only in reference to the effects within the jurisdiction, and the debts that may there be presented against the estate. In his official capacity, he can neither sue nor be sued out of the country from which he derives his authority, and to which he is alone amenable. If he wishes to reach property, or collect debts belonging to the estate in a foreign country, he must there obtain letters of administration, and give such security and become subject to such regulations as its laws may prescribe. So, if a creditor wishes to bring a suit in order to satisfy his debt out of property in another jurisdiction, administration must there be first obtained. See Story's Conflict of Laws, § 513, and the numerous authorities there cited. There are a few cases in this country to the effect that a foreign executor may be sued in another jurisdiction, and be there made liable to the extent of the assets he may have with him; but the cases go no farther than to sustain the action for the purpose of subjecting such assets to the payment of the particular debt. *Campbell v. Tousey*, 7 Cow. 64; *Swearingen's Ex'rs v. Pendleton's Ex'rs*, 4 Serg. & R. 389; *Evans v. Tatem*, 9 Serg. & R. 252; *Bryan v. McGee*, 2 Wash. C. C. R. 337. It may be doubted whether these decisions can be supported on principle or authority; but conceding their correctness, they have no direct bearing on this case. The attempt here is to enforce against an estate a judgment rendered in Ohio against administrators appointed in this State. It is clear that the State of Ohio could not rightfully extend her jurisdiction over the plaintiffs in error, in their official character, while within her limits, further than to compel them to account for such assets as they might there have. The plaintiffs in error derived their authority from this State, and they are to be made responsible here only for their acts. That State may grant letters of administration on the estate, and in that way have the effects found within her territory administered; but she cannot, by proceed-

ings in her own courts, reach the assets in this State, or establish claims against the estate that will here be enforced. The debts against the estate are to be adjusted, and the effects belonging to it distributed, according to our own laws.

But it is insisted that the plaintiffs in error, by entering their appearance to the action in Ohio, submitted themselves to the jurisdiction of the court, and cannot now question its authority to pronounce the judgment. This position would be correct if the proceedings there had been against them personally; but as respects them in their representative capacity, we think the effect is otherwise. The grant of administration in this State gave them no control over the estate in Ohio. It did not confer on them any authority to appear and defend the action; any power to go into another jurisdiction, and there permit claims to be adjudicated against the estate. Their authority is limited, and when they exceed it their acts will not bind the estate. The appearance being wholly unauthorized by our laws, the judgment that resulted from it is not binding on the estate. If binding here, for any purpose, it is against the plaintiffs in error personally. If the judgment had been obtained against an administrator duly appointed in Ohio, the record would not be evidence of indebtedness, in an action against the administrators, in this State. "Where administrations are granted to different persons in different States, they are so far regarded as independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter, in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator." Story's Conflict of Laws, § 522.

We are of the opinion that the judgment, if the allegations of the plea are true, cannot be here enforced against the estate. The demand against the intestate has not been adjusted in pursuance of our laws, but in defiance of them. If the creditor wishes to secure any share of the assets in this State, he must sue on his original cause of action. This conclusion is not in conflict with the case of *Davis v. Connelly's Ex'rs*, 4 B. Mon. 136. That was an action brought in Kentucky against executors appointed in that State, on a judgment obtained against them in Ohio. The executors pleaded that they had never administered in Ohio; and the plaintiff replied that the defendants, acting as executors and professing to be such, entered their appearance in the original action, and thereby became executors *de son tort*, and are estopped to deny that they were executors in Ohio. The court sustained the replication, and decided that the defendants were chargeable as executors in their own wrong. In this case the plaintiffs in error are not sued as executors *de son tort*; but the object of the suit is to enforce the judgment against the estate, and satisfy it out of the assets. . . .

*Judgment reversed.*¹

¹ In most jurisdictions it is held that a foreign executor or administrator cannot be sued as such under any circumstances, even if he resides in the State or is found there

JOHNSON v. WALLIS.

COURT OF APPEALS, NEW YORK. 1889.

[Reported 112 *New York*, 230.]

FINCH, J.¹ This is an action in equity to compel the specific performance by the vendors of a contract to sell and assign a judgment recovered by John McAnerney and others, in the Supreme Court of this State, against a corporation known as the Hudson River Iron Company. The judgment was assigned to one Alexander H. Wallis, who was a resident of New Jersey, and died leaving a last will and testament, which has been duly proved in that State, and by which the defendants were appointed executors. They have qualified, and entered upon the performance of their trust. They thereafter made a written contract with one Jacob Russell, all whose rights have passed to the present plaintiff, to sell and assign to him such judgment for a price to be fixed as follows. The judgment was a lien, or supposed to be a lien, upon certain lands under the waters of the Hudson River, near Poughkeepsie, in this State, and had no value beyond

with assets. *Caldwell v. Harding*, 5 Blatch. 501; *Security Ins. Co. v. Taylor*, 2 Biss. 446; *Mellus v. Thompson*, 1 Cliff. 125; *Hedenberg v. Hedenberg*, 46 Conn. 30; *Jackson v. Johnson*, 34 Ga. 511; *Strauss v. Phillips*, 189 Ill. 1, 59 N. E. 560; *Mason v. Nutt*, 19 La. Ann. 41; *Campbell v. Sheldon*, 13 Pick. 8; *Boyd v. Lambeth*, 24 Miss. 433; *Durie v. Blauvelt*, 49 N. J. L. 114; *Ferguson v. Harrison*, 29 N. Y. Misc. 380, 58 N. Y. Supp. 850; *Sparks v. White*, 7 Humph. 86; *Dorsay v. Connell*, 22 N. B. 564. And this is true, even though by statute a foreign representative may sue. *Fairchild v. Hagel*, 54 Ark. 61; *Sloan v. Sloan*, 21 Fla. 589. And even though the administrator consents to be sued in the foreign State. *Jefferson v. Beall*, 117 Ala. 436, 23 So. 44; *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095; *Flandrow v. Hammond*, 13 App. Div. 325, 43 N. Y. Supp. 143. It is therefore no *devastavit* for an administrator, when sued in a foreign State, to suffer default. *Davis v. Smith*, 5 Ga. 274.

In a few States, however, a foreign representative may under some circumstances be sued as such. Thus it is sometimes held that an administrator who has come to reside within a foreign State may be sued there. *Colbert v. Daniel*, 32 Ala. 314; *Manion v. Titsworth*, 18 B. Mon. 582; *Baker v. Smith*, 3 Met. (Ky.) 264. In other States it is held that if an administrator is found in a foreign State having assets, he may be sued there. *Laughlin v. Solomon*, 180 Pa. 181, 36 Atl. 704; *Tunstall v. Polard*, 11 Leigh, 1; *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063. And a few cases appear to hold that suit may be brought against any foreign administrator upon whom process may be served. *Evans v. Tatem*, 9 S. & R. 252; *Armstrong v. Newey*, 17 Vict. L. R. 734. It is sometimes held that suit may be brought against a foreign representative if all parties in interest consent. *Newark Sav. Inst. v. Jones*, 35 N. J. Eq. 406; *Ellis v. Northwestern Mut. L. Ins. Co.*, 100 Tenn. 177, 43 S. W. 766.

Where a foreign executor or administrator holds adversely within the State assets of the estate, he may be made to account in equity as constructive trustee. *Clopton v. Booker*, 27 Ark. 482; *Johnson v. Jackson*, 56 Ga. 326; *Patton v. Overton*, 8 Humph. 92. — ED.

¹ Part of the opinion, discussing the correctness of the arbitrators' valuation, is omitted. — ED.

such lien. Arbitrators were chosen to fix the value of one acre of the upland, and that value, multiplied by the number of acres subject to the lien, was to be the purchase-price of the judgment. That value was ascertained, the price tendered, and a deed duly demanded, which was refused, and thereupon this action was brought. The plaintiff had judgment which the General Term affirmed, and the defendants appealed to this court.

They rely mainly upon the proposition that as foreign executors they could not sue or be sued in this State, and acquire all their rights from and owe their responsibilities to another jurisdiction. That is the general rule, but in this State at least is confined to claims and liabilities resting wholly upon the representative character. In *Lawrence v. Lawrence* (3 Barb. Ch. 74), the rule was declared to be applicable only to suits brought upon debts due to the testator in his lifetime or based upon some transaction with him, and does not prevent a foreign executor from suing in our courts upon a contract made with him as such executor. Of course where he can sue upon such a contract he may be sued upon it. The remedy must run to each party or neither. In the present case the action is not founded upon any transaction with the deceased but upon a contract which the defendants themselves made. By force of the will and their appointment they became owners of the judgment. Their title, although acquired under the foreign law, was good. In *Peterson v. Chemical Bank* (32 N. Y. 21) the foreign executor sold an obligation of the estate and his assignee sued upon it. The action was sustained on the ground that the title of the foreign executor was good and he could transfer it, and while he could not have sued upon it his assignee was not prevented. In this case, therefore, the defendants were owners of the judgment and could lawfully contract for its sale. Having done so they were liable upon that contract, which could be enforced against them because they made it, and it did not derive its existence from any act or dealing of their testator. We agree, therefore, with the courts below that the action could be maintained. . . .

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

TALMAGE v. CHAPEL.

} SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1819.

[Reported 16 *Massachusetts*, 71.]

THE plaintiff declares as administrator of the estate of George Clinton, in debt upon a judgment recovered by him in his said capacity

¹ But see *Marrett v. Babb* (Ky.), 15 S. W. 4, where it was held that a foreign executor could not enforce specific performance of a contract made by him on behalf of the estate.

against the defendants, in the Court of Common Pleas for the county of Oneida, in the State of New York.

The defendants plead in bar, that the parties, at the time of rendering the said judgment, were all inhabitants of the State of New York, and that the plaintiff was appointed administrator in that State, and has not been so appointed within this commonwealth. To which the plaintiff demurred, and the defendants joined in demurrer.¹

CURIA. We think the plea in bar bad. The case of *Goodwin v. Jones* (5 Mass. 514), cited by the counsel for the defendants, does not apply. The action there was brought for money due to the intestate on a contract made with him; here the action is on a judgment already recovered by the plaintiff, and it might have been brought by him in his own name, and not as administrator. For the debt was due to him, he being answerable for it to the estate of the intestate; and it ought to be considered as so brought, his style of administrator being merely descriptive, and not being essential to his right to recover. It is important to the purposes of justice that it should be so; for an administrator appointed here could not maintain an action upon this judgment, not being privy to it. Nor could he maintain an action on the original contract; for the defendants might plead in bar the judgment recovered against them in New York. The debt sued for is in truth due to the plaintiff in his personal capacity. For he makes himself accountable for it by bringing his action; and he may well declare that the debt is due to himself. There are many cases which show that, where the debt becomes due after the death of the intestate, the administrator may sue for it in his own name; some of which have been cited by the plaintiff's counsel.

*Defendants' plea bad.*²

JOHNSON v. POWERS.¹

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 139 *United States*, 156.]

GRAY, J. This is a bill in equity, filed in the Circuit Court of the United States for the Northern District of New York, by George K.

¹ Arguments of counsel are omitted. — ED.

² *Acc. In re Macnichol*, L. R. 19 Eq. 81; *Newberry v. Robinson*, 36 Fed. 841; *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833; *Barton v. Higgins*, 41 Md. 539; *Rucks v. Taylor*, 49 Miss. 552 (*semble*); *Tittman v. Thornton*, 107 Mo. 500, 17 S. W. 979. *Contra* *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125.

So an administrator *de bonis non* may sue his predecessor in a foreign State for the balance found by his own court to be due from him. *Moore v. Fields*, 42 Pa. 467.

Similarly, where an administrator is sued and gets judgment against the plaintiff for costs, he may sue upon the judgment in another State. *Green v. Heritage*, 63 N. J. L. 455, 43 Atl. 698. — ED.

Johnson, a citizen of Michigan, in behalf of himself and of all other persons interested in the administration of the assets of Nelson P. Stewart, late of Detroit in the county of Wayne and State of Michigan, against several persons, citizens of New York, alleged to hold real estate in New York under conveyances made by Stewart in fraud of his creditors.

The bill is founded upon the jurisdiction in equity of the Circuit Court of the United States, independent of statutes or practice in any State, to administer, as between citizens of different States, any deceased person's assets within its jurisdiction. *Payne v. Hook*, 7 Wall. 425; *Kennedy v. Creswell*, 101 U. S. 641.

At the threshold of the case, we are met by the question whether the plaintiff shows such an interest in Stewart's estate as to be entitled to invoke the exercise of this jurisdiction.

He seeks to maintain his bill, both as administrator and as a creditor, in behalf of himself and all other creditors of Stewart.

The only evidence that he was either administrator or creditor is a duly certified copy of a record of the probate court of the county of Wayne and State of Michigan, showing his appointment by that court as administrator of Stewart's estate; the subsequent appointment by that court, pursuant to the statutes of Michigan, of commissioners to receive, examine, and adjust all claims of creditors against the estate; and the report of those commissioners, allowing several claims, including one to this plaintiff, "George K. Johnson, for judgments against claimant in Wayne Circuit Court as endorser," and naming him as administrator as the party objecting to the allowance of all the claims.

The plaintiff certainly cannot maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect; because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that State, and cannot authorize him to maintain any suit in the courts, either State or national, held in any other State. *Stacy v. Thrasher*, 6 How. 44, 58; *Noonan v. Bradley*, 9 Wall. 394.¹

¹ The foreign representative of a deceased creditor (whether executor or administrator) cannot sue on the claim of the deceased. *Tourton v. Flower*, 3 P. Wms. 369; *Allen v. Fairbanks*, 36 Fed. 402; *Lewis v. Adams* (Cal.), 8 Pac. 619; *Hobart v. Turnpike Co.*, 15 Conn. 145; *Naylor v. Moody*, 2 Blackf. 247; *Gregory v. McCormick*, 120 Mo. 657, 25 S. W. 565 (*semble*); *Bufs v. Price*, C. & N. 68; *Chapman v. Fish*, 6 Hill, 554; *Graeme v. Harris*, 1 Dall. 456; *Dodge v. Wetmore*, Brayt. 92; *Dickinson v. M'Craw*, 4 Rand. 158. Thus an administrator appointed in Maryland before the cession of the District of Columbia to the United States cannot sue in the District after cession. *Fenwick v. Sears*, 1 Cr. 259. If a foreign administrator sues in Massachusetts and is allowed to recover judgment, which is satisfied, suit by a Massachusetts administrator, subsequently appointed, is not barred. *Pond v. Makepeace*, 2 Met. 114.

So a foreign executor or administrator cannot bring a bill of revivor in a suit begun by the deceased before his death. *Barclift v. Treece*, 77 Ala. 528; *Greer v. Ferguson*,

The question remains whether, as against these defendants, the plaintiff has proved himself to be a creditor of Stewart. The only evidence on this point, as already observed, is the record of the proceedings before commissioners appointed by the Probate Court in Michigan. It becomes necessary therefore to consider the nature and the effect of those proceedings.

They were had under the provisions of the General Statutes of Michigan (2 Howell's Statutes, §§ 5888-5906), "the general idea" of which as stated by Judge Cooley, "is that all claims against the estates of deceased persons shall be duly proved before commissioners appointed to hear them, or before the Probate Court when no commissioners are appointed. The commissioners act judicially in the allowance of claims, and the administrator cannot bind the estate by admitting their correctness, but must leave them to be proved in the usual mode." *Clark v. Davis*, 32 Mich. 154, 157. The commissioners, when once appointed, become a special tribunal, which, for most purposes, is independent of the Probate Court, and from which either party may appeal to the Circuit Court of the county; and, as against an adverse claimant, the administrator, general or special, represents the estate, both before the commissioners and upon the appeal. 2 Howell's Statutes, §§ 5907-5917; *Lothrop v. Conely*, 39 Mich. 757. The decision of the commissioners, or of the Circuit Court on appeal, should properly be only an allowance or disallowance of the claim, and not in the form of a judgment at common law. *La Roe v. Freeland*, 8 Mich. 530. But, as between the parties to the controversy, and as to the payment of the claim out of the estate in the control of the Probate Court, it has the effect of a judgment, and cannot be collaterally impeached by either of those parties. *Shurbun v. Hooper*, 40 Mich. 503.

Those statutes provide that when the administrator declines to appeal from a decision of the commissioners, any person interested in the estate may appeal from that decision to the Circuit Court; and that, when a claim of the administrator against the estate is disallowed by the commissioners and he appeals, he shall give notice of his appeal to all concerned by personal service or by publication. 2 Howell's Statutes, §§ 5916, 5917. It may well be doubted whether, within the spirit and intent of these provisions, the administrator, when he is also the claimant, is not bound to give notice to other persons interested in the estate, in order that they may have an opportunity to contest his claim before the commissioners; and whether an allowance of his claim, as in this case, in the absence of any impartial representative of the

56 Ark. 324; *Goodwin v. Jones*, 3 Mass. 514. And therefore a foreign executor may not dismiss a suit begun by his testator. *Warren v. Eddy*, 13 Abb. Pr. 28.

In Michigan it has been held that a foreign executor may bring and maintain a suit upon a claim of the testator, provided he obtains letters of administration in Michigan before trial. *Gray v. Franks*, 86 Mich. 382, 49 N. W. 130. See also *Hodges v. Kimball*, 91 Fed. 845. In several States a foreign executor is allowed to sue by statute. *Lawrence v. Nelson*, 143 U. S. 215; *Bell v. Nichols*, 38 Ala. 678. — Ed.

estate, and of other persons interested therein, can be of any binding effect, even in Michigan. See *Lothrop v. Conely*, above cited.

But we need not decide that point, because upon broader grounds it is quite clear that those proceedings are incompetent evidence, in this suit and against these defendants, that the plaintiff is a creditor of Stewart or of his estate.

A judgment *in rem* binds only the property within the control of the court which rendered it; and a judgment *in personam* binds only the parties to that judgment and those in privity with them.

A judgment recovered against the administrator of a deceased person in one State is no evidence of debt, in a subsequent suit by the same plaintiff in another State, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. *Aspden v. Nixon*, 4 How. 467; *Stacy v. Thrasher*, 6 How. 44; *McLean v. Meek*, 18 How. 16; *Low v. Bartlett*, 8 Allen, 259.

In *Stacy v. Thrasher*, in which a judgment, recovered in one State against an administrator appointed in that State, upon an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the Circuit Court of the United States held within another State against an administrator there appointed of the same intestate, the reasons given by Mr. Justice Grier have so strong a bearing on the case before us, and on the argument of the appellant, as to be worth quoting from: —

“The administrator receives his authority from the ordinary, or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction.” 6 How. 58.

In answering the objection that to apply these principles to a judgment obtained in another State of the Union would be to deny it the faith and credit, and the effect, to which it was entitled by the Constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel only between the same parties, or their privies, or on the same subject-matter when the proceeding was *in rem*; and that the parties to the judgments in question were not the same; neither were they privies, in blood, in law, or by estate; and proceeded as follows:

“An administrator under grant of administration in one State stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the

other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts." 6 How. 59, 60.

"It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger." "The laws and courts of a State can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta*. It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel." 6 How. 60, 61.

In *Low v. Bartlett*, above cited, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similar to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying: "The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor." 8 Allen, 266.

In the case at bar, the allowance of Johnson's claim by the commissioners appointed by the Probate Court in Michigan, giving it the utmost possible effect, faith, and credit, yet, if considered as a judgment *in rem*, bound only the assets within the jurisdiction of that court, and, considered as a judgment *inter partes*, bound only the parties to it and their privies. It was not a judgment against Stewart in his lifetime, nor against his estate wherever it might be; but only against his assets and his administrator in Michigan. The only parties to the decision of the commissioners were Johnson, in his personal capacity, as claimant, and Johnson, in his representative capacity, as administrator of those assets, as defendant. The present defendants were not parties to that judgment, nor in privity with Johnson in either capacity. If any other claimant in those proceedings had been the plaintiff here, the allowance of his claim in Michigan would have been no evidence

of any debt due to him from the deceased, in this suit brought in New York to recover alleged property of the deceased in New York from third persons, none of whom were parties to those proceedings or in privity with either party to them. The fact that this plaintiff was himself the only party on both sides of those proceedings cannot, to say the least, give the decision therein any greater effect against these defendants.

The objection is not that the plaintiff cannot maintain this bill without first recovering judgment on his debt in New York, but that there is no evidence whatever of his debt except the judgment in Michigan, and that that judgment, being *res inter alios acta*, is not competent evidence against these defendants.

This objection being fatal to the maintenance of this bill, there is no occasion to consider the other questions, of law or of fact, mentioned in the opinion of the Circuit Court and discussed at bar.

*Decree affirmed.*¹

BROWN, J., dissenting.²

AN- get all v. VANQUELIN v. BOUARD.

COMMON PLEAS. 1863.

[Reported 15 Common Bench, New Series, 341.]

ERLE, C. J.³ — Upon the argument of these demurrers, several questions have been raised with reference to the French law. The founda-

¹ *Acc.* Taylor v. Brown, 35 N. H. 484. And so a Massachusetts executor cannot prove in the Massachusetts Probate Court a balance allowed him on an accounting as ancillary administrator in a foreign court. *Ela v. Edwards*, 13 All. 48.

So generally a judgment obtained in one State against the representative of the deceased there appointed will not be recognized in another State in a suit against the representative there. *Aspden v. Nixon*, 4 How. 467; *McLean v. Meek*, 18 How. 16; *Dent v. Ashley*, *Hemph.* 54; *Arizona Cattle Co. v. Huber* (Ari.), 33 Pac. 555; *Turner v. Risor*, 54 Ark. 33; *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833; *McGarvey v. Darnall*, 134 Ill. 367, 25 N.E. 1005; *Creswell v. Slack*, 68 Ia. 110; *Low v. Bartlett*, 8 All. 259; *Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38; *Brodie v. Bickley*, 2 Rawle, 431; *King v. Clarke*, 2 Hill Eq. 611; *Jones v. Jones*, 15 Tex. 463; *Price v. Mace*, 47 Wis. 23; *Tighe v. Tighe*, Ir. R. 11 Eq. 203. *Contra*, *Creighton v. Murphy*, 8 Neb. 349, 1 N. W. 138, where process was served on the deceased before his death. This is true even though the foreign administrator was the same person as the domestic representative. *Johnson v. McKinnon*, (Ala.) 29 So. 696; *S. v. Fulton*, (Tenn. Ch.) 49 S. W. 297.

In Louisiana it has been held that judgment against an executor may be enforced against him in any other State in which he has also been appointed *executor*. *Turley v. Dreyfus*, 33 La. Ann. 885. And in a few States it has been held that where judgment has been obtained against a executor he may be sued on it personally in another State. *Latine v. Clements*, 3 Ga. 426; *White v. Archbill*, 2 Sneed, 588. — Ed.

² The dissenting opinion is omitted. — Ed.

³ The statement of facts, arguments of counsel, and part of the opinion, in which the validity of certain pleas is discussed, are omitted. WILLIAMS and KEATING, JJ., delivered concurring opinions. — Ed.

tion of the litigation was certain bills of exchange of which the deceased, Jacques Alexander François Vanquelin, was drawer, the defendant the acceptor, and one Bolli the indorsee. Bolli brought an action against both drawer and acceptor in the Court of the Tribunal de Commerce of the department of the Seine, and obtained judgment against them. Vanquelin, the drawer, died: his widow, the now plaintiff, in accordance with the laws of France, became the donee of the universality of the real and personal estates belonging to the succession of the deceased at his death; and she alleges that thereby and according to the laws of France all rights, claims, and causes of action, and all liabilities and obligations of the deceased vested in her personally and absolutely, and she became, according to the said laws, liable personally upon the said judgment, and also entitled personally and in her own name to sue for and enforce all the rights and claims of the deceased, and that she was according to the said laws substituted for and placed in the same position with respect to the defendant, as regarded the said bills of exchange and the judgment thereon, to all intents and purposes, as the deceased had been in his lifetime. The count then goes on to allege that afterwards, and whilst the judgment was in full force and unsatisfied, and the plaintiff and defendant were both liable thereupon, the plaintiff, in accordance with the laws of France, was obliged to pay and did pay the full amount of the judgment and all interest due thereon, and that thereupon Bolli delivered to her the said bills of exchange and the record of the said judgment, and the plaintiff then became and still was according to the laws of France entitled to the benefit of all the rights of Bolli upon the said judgment against the defendant, and entitled to enforce the same against the defendant, and to be substituted for Bolli in all his rights against the defendant in respect of the said judgment; and that the defendant became indebted and liable to pay her the amount so paid by her upon the said judgment, with 6 per cent interest thereon until payment. The count then goes on to allege that the plaintiff, having these rights, in order to keep alive the liability of the defendant, and to prevent the same from being barred by lapse of time, and in order to give effect to and enforce her claim against the defendant, took proceedings in the Tribunal Civil of the First Instance of the department of the Seine, and that thereupon, according to the practice and procedure of the said court, on the 2d of April, 1862, by adjudication of the said court an injunction was made to the defendant to pay certain sums of money for principal, interest, and costs, and it was adjudged and notified to the defendant that he would be constrained to do so by all lawful means and by arrest of his body. That is the substance of the first count. The substance of the second count is, that certain bills of exchange were drawn upon the defendant by the deceased, and accepted by him, and dishonoured; that the deceased died, and the plaintiff was according to the laws of France the donee of the universality of the personal and real estates belonging to the succession of the deceased, and thereupon became entitled to all debts,

claims, and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely, in the same manner to all intents and purposes as they were vested in the deceased, and the plaintiff was entitled to demand and sue for the same in her own name and in her own right, and the claims and rights of the deceased upon the said bills became vested in the plaintiff, and she became entitled to sue the defendant thereupon in her own name and in her own right; and she demands payment of the amount thereof and interest. The ground of the demurrer to these two counts, is, that the plaintiff is in effect suing in a representative character, which she cannot do without having obtained letters of administration in this country. The allegation in both counts is, that, being donee of the universality of the personal and real estates belonging to the succession of her deceased husband, the plaintiff became according to the laws of France entitled to all the property and rights of the deceased absolutely in her own right, and not in any representative capacity. I am of opinion that that averment, if it were necessary to stand upon it, must be taken to be true, and so it appears upon the record that the law of France, in which country all the parties were domiciled, would give her a *locus standi* to sue there in her personal capacity. But it is not necessary to rest upon that. The first count shows, that, after the death of her husband, the plaintiff paid the amount due to Bolli in respect of the bills and the judgment; and that, it seems, would give her the right to sue in the courts of France in her own name and in her own right, as indeed it would in this country also. It has on many occasions been held that an executor or administrator has his election to sue either in his own right or in his representative character in respect of transactions arising since the death of the testator or intestate, although what is recovered would be assets in his hands. Here, the alleged cause of action is founded mainly upon what was done by the plaintiff after the death of her husband. There is a further answer to the demurrer to the first count, viz. that the rights of the plaintiff were confirmed by the second adjudication or injunction obtained by her in the Tribunal Civil of the First Instance of the department of the Seine, which entitled her to execution against the defendant in that country. It seems to me, therefore, that there is abundant on the first count to show that the plaintiff has a good cause of action against the defendant in her individual capacity, without having recourse to the special matter before adverted to. As to the demurrer to the second count, it is clear that the plaintiff took the bills on the death of her husband, and, if nothing more appeared, she could only enforce them here by clothing herself with the character of his representative. But the law of domicile attaches to these parties; and there is a distinct averment that the plaintiff was, according to the laws of France, "the donee of the universality of the personal and real estates belonging to the succession of the deceased, and thereupon became entitled to all debts, claims,

and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely in the same manner to all intents and purposes as they were vested in the deceased, and the plaintiff was and is entitled to demand and sue for the same *in her own name and in her own right*, and the claims and rights of the deceased upon the said bills became vested in the plaintiff, and the plaintiff became entitled to sue the defendant thereupon *in her own name and in her own right*." I think it sufficiently appears upon this record that the plaintiff was entitled to sue upon these bills in her own right; the fact of her being the donee of the universality of the personal and real estates belonging to the succession of her deceased husband giving her by the law of France rights different from those which an executor or an administrator has in this country. I am therefore of opinion that the plaintiff is entitled to our judgment upon the demurrers to both counts of the declaration.¹

CURRIE v. BIRCHAM.

KING'S BENCH. 1822.

[Reported 1 *Dowling & Ryland*, 35.]

ASSUMPSIT for money had and received by the defendants to the plaintiff's use. The defendants pleaded the general issue; the statute of limitations; and several special pleas. The question at the trial arose upon the plea of the general issue. At the trial before ABBOTT, C. J., at the Guildhall Sittings after last Michaelmas Term, the case proved in evidence was this: In the year 1806, Norman Newby, quartermaster of the 84th regiment of foot, went out to India, indebted to the plaintiff, a laceman in London, and to other tradesmen, for his military equipments, and other property of considerable value. Shortly after his arrival in India, he died intestate. His wife took

¹ Where by the law of the domicile of the deceased a universal successor legally becomes entitled at the death to all his rights and subject to all his liabilities, such successor may sue or be sued upon such rights or liabilities in a foreign State. *Beavan v. Hastings*, 2 K. & J. 724; *King v. Martin*, 67 Ala. 177.

A representative may sue in a foreign State upon any right which did not form part of the estate of the deceased, but accrued to him after the death, even though he will be accountable as such representative to his court for what he recovers. *Perkins v. Stone*, 18 Conn. 270; *Steitler v. Helenbush*, (Ky.) 61 S. W. 701. Thus he may sue upon a note running to him as administrator: *Rittenhouse v. Ammerman*, 64 Mo. 197; *Tillman v. Walkup*, 7 S. C. 60; upon a judgment assigned to him as administrator: *Rucks v. Taylor*, 49 Miss. 552; upon a policy of insurance taken out by him on the property of the estate: *Abbott v. Miller*, 10 Mo. 141; to recover a deposit he has made as administrator in a foreign bank: *Bingham v. Marine Nat. Bank*, 112 N. Y. 661, 19 N. E. 416; to recover dividends on stock in a foreign corporation: *Smith v. Cuyler*, 78 Ga. 654, 3 S. E. 406. — Ed.

out letters of administration of his effects in the Recorder's Court at Bombay; and, having collected some of his effects, realized the proceeds in government bills, drawn on England, and returned to this country, leaving a brother officer of her husband to collect the remainder of his effects, and remit the proceeds in like manner, for her account, after she quitted India. The defendants' testator, John Moore, had been Mr. Newby's agent, and all the bills in question came to his hands through the medium of Mrs. Newby, and as was alleged, converted by him into cash. The plaintiff being unable to obtain payment of his debt, in the year 1816, took out letters of administration of the estate and effects of Mr. Newby, as his creditor, in the Prerogative Court of the Archbishop of Canterbury, and filed a bill in Equity against Mr. Moore, and Mrs. Newby (who was then married to another husband), to account for the money which had come into their hands, the property of the intestate. In his answer to this bill, filed in 1817, Mr. Moore stated, that he had paid over all the money which had come to his hands, to Mrs. Newby, as the administratrix of her husband's effects and as her agent, with the exception of a sum of £170 which he retained for a debt contracted with him by the intestate when living. Mr. Moore afterwards died, and by his will appointed the defendants his executors, against whom the present action was brought. At the trial, the plaintiff's claim was reduced to the sum of £170 which Mr. Moore, in his answer to the bill in Chancery, admitted he had retained in his hands for a debt due to him from the intestate. The question was, as to the plaintiff's right to sue. It was objected, that the letters of administration granted by the Recorder's Court at Bombay to Mrs. Newby, must prevail against the administration granted to the plaintiff in this country, and that if any action lay against Moore's executors, it must be at the suit of Mrs. Newby, he having been her agent. Of this opinion was ABBOTT, C. J., who nonsuited the plaintiff, but gave him leave to move to enter a verdict for the sum of £170 above-mentioned, if the court should be of opinion that the action was well brought.

Marryat now moved accordingly to set aside the nonsuit, and enter a verdict for the plaintiff for £170. He contended, that the plaintiff was entitled to maintain this action by virtue of the letters of administration granted to him in this country. Admitting that the letters of administration granted to Mrs. Newby, in the Recorder's Court of Bombay, to be valid and effectual in that country, still they could not operate here; and therefore it was incumbent on Mrs. Newby, if she meant to act as administratrix of her husband's effects, to have taken out letters of administration in this country. This she had not done; and the letters granted to her in India could not prevail against those which had been granted to the plaintiff by the Prerogative Court. The operation of her letters had ceased on her quitting India. Then, as the effects of Newby were not realized until they reached this country, when the bills were converted into cash, the plaintiff was entitled to administer that

money by virtue of the administration which he had obtained, and consequently this action was well brought. *Vide* *Tourton v. Flower*, 3 P. Wms. 369; *Jannery v. Sealey*, 1 Vent. 39; and 26 Geo. III. c. 57.

PER CURIAM. We are of opinion that this action will not lie at the suit of this plaintiff. The wife of the intestate is entitled to all the effects of which her husband died possessed in India, by virtue of the letters of administration granted to her in that country. It is not suggested that the sum of money in question was not a part of the proceeds of the intestate's effects. The effects are remitted to this country by her in the shape of bills, and they come to the hands of her agent Moore. He receives the money to her use, and in her own right as administratrix. If she has any claim upon the money, which it is alleged that Moore retained in his hands, she may maintain an action, but it will not lie at the suit of this plaintiff, under the letters of administration which he has obtained.

PETERSEN *v.* CHEMICAL BANK.

COURT OF APPEALS, NEW YORK. 1865.

[*Reported 32 New York, 21.*]

THIS action was brought in the Superior Court of New York to recover the sum of \$32,321.24, being an amount standing to the credit of Aaron Cohen, as a dealer on the books of the defendants' bank in New York. Cohen died at the city of New Haven in Connecticut, on the 27th day of July, 1862. He left a last will and testament, executed in New York, on the 11th June, 1861, which was duly attested by two witnesses, by which he appointed David McCoard and Cohen M. Soria of New Orleans, executors. The will was proved and admitted to record in the Probate Court of the District of New Haven, in September, 1862; and the executors not appearing to qualify, and one of them having renounced, administration with the will annexed was granted to David J. Peck of New Haven, he giving a bond with several sureties, in the penalty of \$200,000, conditioned to make an inventory, and to account, etc. He demanded of the defendants the above amount standing to the credit of Cohen, presenting an authenticated copy of his appointment, but payment was declined. He then, on the 2d December 1862, made a transfer under his hand and seal of the debt due from the defendants to the plaintiff in this action. The

¹ *Acc.* *Williamson v. Branch Bank*, 7 Ala. 906; *Holcomb v. Phelps*, 16 Conn. 127; *Norton v. Palmer*, 7 Cush. 523; *Dorsay v. Connell*, 22 N. B. 564. *Contra*, *Naylor v. Moffatt*, 29 Mo. 126. And see *Bond v. Graham*, 1 Hare 482.

Where personal property is brought into a State after the death of the deceased, the executor or administrator appointed in the State where the property was at the death may sue in the former State for injury to the property. *Clark v. Holt*, 16 Ark. 257; *Embry v. Millar*, 1 A. K. Marsh. 300.—Ed.

instrument is expressed to be in consideration of \$32,321.24 received to the assignor's full satisfaction; and it contains proper words of sale and assignment, and a guaranty of the collection of the amount, and a promise to indemnify the plaintiff against loss by reason of the purchase. The plaintiff called at the bank with this instrument, presenting his own check and also that of Peck, and demanded the money. He also exhibited an instrument, signed by all the legatees named in the will, with the exception of one who resided in an insurgent State, and who was entitled to one-sixth of the residue, requesting that the money might be paid over to Peck as administrator; but the defendant persisted in refusing payment, on the ground, apparently, that it could not safely be paid, except to an administrator appointed under the laws of this State.

The controverted questions of fact to which the evidence on the trial was directed, related to the domicil of Cohen at the time of his death, and to the circumstances under which the transfers to the plaintiff were made.¹

It was very clearly proved that he owed no debts in New York, and only a few very small sums in New Haven. The legatees in his will, besides \$15,000 to a friend in New York and \$5,000 to another in New Orleans, and \$5,500 to his servants, were his brothers and sisters in New York, New Orleans, and Philadelphia.

In regard to the transfer, the evidence was that the plaintiff was one of the sureties of Peck in the administration bond, and had acted as his agent in the settlement of the estate. The consideration did not appear to have been paid absolutely. The amount was advanced by the plaintiff, and, together with other moneys of the estate, was deposited in a bank in the name of the plaintiff as trustee, he having, however, by the arrangement, no right to claim it, except by the direction of Peck, the intention apparently being that it should be paid out in the course of administration.

The defendant's counsel moved for the dismissal of the complaint, on the grounds that an action would not lie by an assignee of a foreign administrator; that there was no consideration for the transfer, and that it was made to evade the laws of this State, and that the Probate Court in Connecticut had not jurisdiction; and the counsel also insisted that the question as to the domicil of Cohen should, at least, be submitted to the jury. The motion was denied, and the judge instructed the jury to find for the plaintiff. The defendant's counsel excepted. It was directed that the exceptions be heard, in the first instance, at the General Term. The verdict was for the plaintiff for the amount claimed, with interest; and judgment for the plaintiff was rendered thereon at the General Term, upon which the defendant brought this appeal.

¹ So much of the statement of facts and opinion as involve the decision of this question of fact is omitted. The arguments of counsel and concurring opinion of PORTER, J., are also omitted — Ed.

DENIO, C. J. The evidence was quite conclusive that the domicile of Cohen at the time of his death was at New Haven. . . . A foreign executor or administrator (and one appointed under the laws of a sister State of the Union is foreign in the sense of the rule), cannot sue in his representative character in the courts of this State. The question whether a party deriving title to a chose in action by transfer from such an executor or administrator, can prosecute the debtor residing here, in our courts, has been variously decided in the cases to which we have been referred. In the Supreme Court, in the first district, the Merchants' Bank of New York was sued for refusing to transfer to the plaintiff one hundred shares of its stock, to which the latter made title by transfers from the executors of one Robert Middlebrook, in whose name the stock stood on the books of the bank. He died at his residence in Connecticut, and his will had been proved, and letters testamentary had been issued by the Probate Court of the proper district in that State. The plaintiff was a legatee of a certain amount of the testator's stock, and the shares in controversy had been assigned to him in satisfaction of the legacy. The court held that the executors became vested with the title to the stock, and that the plaintiff, though he derived his title under them, could enforce his right against the bank in our courts, and judgment was accordingly given in his favor. *Middlebrook v. The Merchants' Bank*, 27 How. Pr. 474; s. c. at Special Term, 24 How. Pr. 267.

A different rule has been established in the courts of New Hampshire and of Maine. *Thompson v. Wilson*, 2 N. H. 291; *Stearns v. Burnham*, 5 Greenl. 261. In each of these cases the defendant was sued as the maker of a promissory note, by parties claiming as indorsees under indorsements by the executors of the payees who were respectively residents of Massachusetts, and whose wills were proved and letters thereon issued in that State. The defendants prevailed in each case, on the objection that the respective plaintiffs were subject to the same disability to sue which would have attached to the executors if they had attempted to prosecute in another State than that under whose laws their letters testamentary were granted. In the first case the judgment was placed upon the English ecclesiastical law, by which probates of wills and grants of administration are void when not made by the *ordinary* of the proper diocese, a doctrine which I do not think applicable to questions arising between different States, as it makes no allowance for the principles of international comity. In the case in Maine, it was thought that allowing a recovery would be an indirect mode of giving operation in Maine to the laws of Massachusetts, and also that the effects of the deceased might thereby be withdrawn from the State, to the prejudice of creditors residing there.

The precise case now before us came before the Supreme Court of the United States in *Harper v. Butler* (2 Pet. 239). The suit was brought in Mississippi, on a chose in action, originally existing in favor of a citizen of Kentucky, who died there, and whose executor

having letters testamentary issued in that State, assigned it to the plaintiff. In Mississippi, choses in action are assignable so as to permit the assignee to sue in his own name, as is now the case in this State. The question arose on demurrer to the complaint, and the District Court sustained the demurrer. The judgment was reversed upon a short opinion by Chief Justice Marshall, which merely states the point, and contains no general reasoning. No counsel appeared on behalf of the defendant.

The case in Maine has been made the subject of comment in Story's Treatise on the Conflict of Laws (§§ 258, 259), and is decidedly disapproved by the learned writer. He says, that upon the reasoning of the case a promissory note would cease to be negotiable after the death of the payee, which, he observes, would certainly not be an admissible proposition.

It seems clear to me that there are no precedents touching the question which are binding upon this court, or which can relieve it from the duty of examining the question upon principle. There are certain legal doctrines, now very well established, which have a strong bearing upon the point. It is very clear, in the first place, that neither an executor or administrator, appointed in a foreign political jurisdiction, can maintain a suit in his own name in our courts. Foreign laws have no inherent operation in this State; but it is not on this account solely or principally that we deny foreign representatives of this class a standing in our courts. The comity of nations, which is a part of the common law, allows a certain effect to titles derived under and powers created by the laws of other countries. Foreign corporations may become parties to contracts in this State, and may sue or be sued in our courts on contracts made here or within the jurisdiction which created them. The only limitation of that right is the inhibition to do anything in its exercise which shall be hostile to our own laws or policy. *Bank of Augusta v. Earle*, 13 Pet. 519; *Bard v. Poole*, 2 Kern. 495, 505, and cases cited. And yet nothing can be more clearly the emanation of sovereign political power than the creation of a corporation. Again, the receivers of insolvent foreign corporations, and assignees of bankrupt and insolvent debtors, under the laws of other States and countries, are allowed to sue in our courts. It is true their titles are not permitted to overreach the claims of domestic creditors of the same debtor, pursuing their remedies under our laws; but in the absence of such contestants they fully represent the rights of the foreign debtors. Story's Conf. Laws, § 112; *Hoyt v. Thomasen*, 1 Seld. 320; s. c. 19 N. Y. 207; *Willeys v. Waite*, 25 N. Y. 584. It is not therefore because the executor or administrator has no right to the assets of the deceased, existing in another country, that he is refused a standing in the courts of such country, for his title to such assets, though conferred by the law of the domicile of the deceased, is recognized everywhere. Reasons of form, and a solicitude to protect the rights of creditors and

others, resident in the jurisdiction in which the assets are found, have led to the disability of foreign executors and administrators, which disability, however inconsistent with principle, is very firmly established. We have lately decided that if the debtors of the deceased will voluntarily pay what they owe to the foreign executor, such payment will discharge the debts, and the moneys so collected will be subject to the administration of such foreign executor. *Parsons v. Lyman*, 20 N. Y. 103.

But the principle of law which I think governs this case is, that the succession to the personal estate of a deceased person is governed by the law of the country of his domicile at the time of his death. This is so whether the succession is claimed under the law providing for intestacy or for transmission by last will and testament. See *Parsons v. Lyman*, *supra*, and authorities cited at p. 112. It is not so held because the foreign legislature or the local institutions have any extra-territorial force, but from the comity of nations. Accordingly, it is a necessary supplement to the doctrine that, if the law-making power of the State where the property happens to be situated, or the debtor of the deceased reside, to subserve its own policy, has engrafted qualifications or restrictions upon the rights of those who would succeed to the estate by the law of the domicile, they must take their rights subject to such restrictions. One of the most natural, as well as the most usual of these qualifications is that which is intended to secure the creditors of the deceased residing in the country where the assets exist. It is in part to subserve this policy that the personal representatives are not permitted to prosecute the debtor or parties who withhold his effects in our courts. But the protection to the creditor is further secured by the remedy which is provided by allowing them to take out administration in the jurisdiction where the assets are. If the deceased have any relatives in this State who would be preferably entitled, they can be summoned, and if they elect to take out letters themselves, they will be compellable to give bond, and the creditors will be then made secure in their rights, or if the relatives refuse to assume that responsibility, then the creditors may themselves be appointed, and thus qualified to take possession of the assets here upon the same terms. 2 R. S. 73, §§ 23, 24. If the debtors of the estate elect to pay to the former representative, or to deliver to him the movable assets, before the granting of administration in this State, the domestic creditors are put to the inconvenience of asserting their rights in the courts of the country of their debtor's domicile against his representatives appointed under the laws of that country, just as they would have been compelled to do if all his effects had been situated there. Another general principle of law necessary to be averted to is, that the executor of a testator, as soon at least as he has clothed himself with the commission of the Probate Court, is vested with the title to all the movable property and rights of action which the deceased possessed at the instant of his death. The title of the executor,

it is true, is fiduciary and not beneficial. That title is, however, perfect against every person except the creditors and legatees of the deceased. The devolution of ownership is direct to the representative, and the beneficiaries take no title in the specific property which the law can recognize. An administrator with the will annexed, has the same rights of property as the executor named in the will would have had if he had qualified. 2 R. S. 72, § 22.

The law of maintenance while it existed, prohibited the transfer of the legal property in a chose in action, so as to give the assignee a right of action in his own name. But this is now abrogated, and such a demand as that which is asserted against the defendant in this suit may be sold and conveyed so as to vest in the purchaser all the legal, as well as the equitable rights of the original creditor. Code, § 111. Though such demands are not negotiable in precisely the same sense as commercial paper, since the assignee is subject to every substantial defence which might have been made against the assignor, yet where, as in this case, no such defence exists, the transfer is absolute and complete. The title which is vested in the executor carries with it the *jus disponendi* which generally inheres in the ownership of property. "It is a general rule of law and equity," says Judge Williams, in his treatise on executors, "that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee." Treatise, p. 796; see also *Whale v. Booth*, 7 Term R. 625, in note to *Farr v. Newman*; *Sutherland v. Breesh*, 7 Johns. Ch. 17; *Rawlinson v. Stone*, 3 Wils. 1; *Harper v. Butler*, *supra*.

It follows that the plaintiff presented himself to the Superior Court as the owner by purchase and assignment of the debt against the defendant, from a person holding the title and hence having authority to sell. He claimed to recover, not as the representative of any other party, but as the substituted creditor of the defendants' bank. He had, it is true, to make title through the will of Cohen, and the proceedings of the Probate Court of Connecticut. But the validity of that title depended upon the law of Connecticut, that being the place of the domicil of the former owner of the demand. The validity of every transfer, alienation, or disposition of personal property depends upon the law of the owner's domicil. Story on Conf. of Laws, § 383. In the absence of proof to the contrary, we assume the law of Connecticut respecting the alienation of choses in action to be the same as our own. If Cohen had, at his death, been a resident of this State, and his administrator with the will annexed had sold and assigned to the plaintiff his demand against the bank, there is no manner of doubt but that the assignee, upon the refusal of the bank to pay the amount, could have maintained this action.

Hence there is not, I think, any reason why the plaintiff should be precluded from maintaining his action, on account of his making title

through a foreign administration. The rule is not that our courts do not recognize titles thus acquired. It is simply that a foreign executor or administrator can have no standing in our courts. The plaintiff does not occupy that position. He sues in his own right and for his own interest, and represents no one. In my opinion, the disability to sue does not attach to the subject of the action, but is confined to the person of the plaintiff. If he is an unexceptionable suitor, and there is no rule of form or of policy which repels him from our courts, he is to be received, and he may make out his title to the subject claimed, in any manner allowed by law; and it has been shown that title acquired through a foreign administration is universally respected by the comity of nations.

It is pretty obvious from the evidence of the circumstances of the transfer by Peck to the plaintiff, that its object was to avoid the objection which might be taken if Peck had sued in his own name as administrator, without taking out letters here. There was no other conceivable motive for the plaintiff to purchase this moneyed demand payable immediately, for its precise amount paid down. If his check on the bank, drawn shortly after the transfer, had been answered, he would have received the precise amount he had parted with, and the transaction at the best would have been paying with one hand to receiving the same amount back with the other. If he failed to realize the amount, he was to be indemnified by Peck. This circumstance, and the manner in which the assumed consideration was disposed of, would doubtless have led the jury to find, that the form adopted was resorted to in order to enable the administrator to avail himself of the balance in the defendant's bank, without taking out administration here. Still, as between the plaintiff and Peck, the interest in the demand passed. Peck would have been estopped by his conveyance under seal, containing an acknowledgment of the payment of the consideration, from setting up that nothing passed by the conveyance. I am of opinion that the defendant cannot make a question as to the consideration. If all the parties had been residents of this State, a transfer of the demand, good as between the parties to that transfer, would have obliged the defendant to respond to the action of the transferee. Then if we hold, as I think we should, that the objection to the suit of the administrator was in the nature of a personal disability to sue, and not an infirmity inhering in the subject of the suit, the fact that the transfer was made for the purpose of getting rid of the objection, should not prejudice the plaintiff. The cases which have been referred to upon this point have considerable analogy. The Constitution and laws of the United States confer upon the courts of the Union jurisdiction in suits between citizens of different States, with an exception contained in an act of Congress, of one suing as the assignee of a chose in action, of a party whose residence was such as not to permit him to sue. In an action by an assignee concerning the title to land, which was not within the exception, it was held not to

be an objection which the defendant could take, that the assignment was made for the purpose of removing the difficulty as to jurisdiction. *Briggs v. French*, 2 Sumn. 251. In a late case in this court against a foreign corporation, which could not be prosecuted here except by a resident of this State, unless the cause of action arose here or the subject of the action was situated here, it was held that the objection — that the assignment of the demand by one not qualified by his residence to sue, to the plaintiff who was thus qualified, was made for the purpose of avoiding the difficulty — could not be sustained. *McBride v. The Farmers' Bank*, 26 N. Y. 450.

I have not thus far referred to the circumstance, that Cohen was shown not to have owed any debts in this State. That fact was proved as strongly as in the nature of the case such a position could be established. The administrator, whose business it was to ascertain the existence of debts, and the confidential servant of Cohen who was very familiar with his transactions, affirmed that there were none; and the defendant gave no evidence on the subject. The motive of policy for forbidding the withdrawal of assets to the prejudice of domestic creditors, did not therefore exist in this case. Still, if the rule is that neither the foreign administrator or his assignee can maintain an action in our courts to collect a debt against a debtor residing here, on account of its tendency to prejudice domestic creditors, the exceptional features of the present case would not change the principle. It would often be more difficult than in this case to disprove the existence of such debts. But I am of opinion that the objection should be regarded as formal, and that it does not exist where the plaintiff is not a foreign executor or administrator but sues in his own right, though his title may be derived from such a representative.

I am in favor of affirming the judgment of the Supreme Court.

*Judgment affirmed.*¹

¹ *Acc.* *Harper v. Butler*, 2 Pet. 239; *Camp v. Simon*, (Utah) 63 Pac. 332; *Munson v. Exchange Nat. Bank*, 19 Wash. 125, 52 Pac. 1011. But see *Heyward v. Williams*, 57 S. C. 235, 35 S. E. 503. Where negotiable paper, part of the estate, is transferred by the representative appointed in the State of domicile of the deceased, the transferee may sue in another State in his own name. *Campbell v. Brown*, 64 Ia. 425; *Rand v. Hubbard*, 4 Met. 252 (*semble*); *Owen v. Moody*, 29 Miss. 79; *Gove v. Gove*, 64 N. H. 503, 15 Atl. 121 (see *Thompson v. Wilson*, 2 N. H. 291); *Mackay v. St. Mary's Church*, 15 R. I. 121, 23 Atl. 108. *Contra*, *Stearns v. Burnham*, 5 Me. 261; *McCarty v. Hall*, 13 Mo. 480. So a foreign representative may sue in his own name on a note payable to bearer. *Knapp v. Lee*, 42 Mich. 41, 3 N. W. 244. And if he is allowed by statute to sue, in a foreign State, he may sue on a note payable to the deceased, though there is a local representative. *Eells v. Holder*, 2 McCrary, 622, 12 Fed. 668. So a foreign executor may present a note payable to his testator for payment or protest. *Rand v. Hubbard*, 4 Met. 252.

When the representative at the domicile of the deceased transfers stock, the transferee may have the stock transferred to his name on the books. *Brown v. S. F. Gaslight Co.*, 58 Cal. 426; *Luce v. R. R.*, 63 N. H. 589, 3 Atl. 618; *Middlebrook v. Merchants' Bank*, 3 Keyes, 135, 3 Abb. Dec. 295. And a foreign executor has a right to vote on stock belonging to his testator. *In re Election of Cape May, &c. Nav. Co.*, 51 N. J. L. 78, 16 Atl. 191. — Ed.

THURBER *v.* CARPENTER.SUPREME COURT OF RHODE ISLAND. 1895. [*Reported 18 Rhode Island, 782.*]

STINESS, J. This is a bill to enjoin the completion of a sale of real estate in Pawtucket, in this State, under a power of sale contained in a mortgage given by the complainants to William Carpenter, deceased, late of Attleborough, Massachusetts, and also to set aside the mortgage. The respondent, Edwin F. Carpenter, was duly appointed administrator upon the estate of William Carpenter in Massachusetts, and under the power in the mortgage, which ran to the mortgagee, his executors, administrators, and assigns, he advertised the property for sale at public auction, and sold the same to the respondent Phillips. The preliminary question, whether a foreign administrator can execute such a power in this State, is the one which is now argued to the court. The advertisement of the sale was signed by "Edwin F. Carpenter, assignee of the mortgagee," and the complainants urge that he was not an assignee, because there had been no formal assignment of the mortgage to him, and also that as administrator in another State he had no standing or power to act as such in this State. In *Douglas v. Hennessy*, 15 R. I. 272, it was held that an administrator is an "assign" of his intestate by act of law, if such a construction comports with the character and intent of the instrument, as it certainly does in this case. The proper name having been signed by one who was in fact an assignee, we do not see that there was need to set out the mode of the assignment, whether by act of the parties or by act of law. But the question remains: Could he, as a foreign administrator, execute the power in this State?

There can be no doubt of the rule that an administrator cannot sue, as such, outside of the State where he is appointed; nor of the rule that as to real estate the law of the place where it lies is to govern in case of its transfer. Under these rules it has been held that a foreign administrator cannot assign a mortgage, where it affects the title to real estate. *Cutter v. Davenport*, 1 Pick. 81, was a case of this kind which is very often cited. The opinion held that under the statute, common to most of the States, both the land and the debt were to be treated as personal property in the hands of the executor, and that he could dispose of it as if it had been personal estate pledged, but that the statute related only to local and not to foreign executors and administrators. It then goes on to say that after foreclosure the land becomes the principal thing, because the debt is then extinguished to the extent of the value of the land, and that an administrator who is appointed in the State could not convey real estate, except as provided by statute.

The harmony of these positions is not clearly apparent, but from other parts of the opinion, and from the cases cited, the real ground of the decision seems to be that, as a suit for foreclosure or a writ of entry may be necessary to enforce the right under the mortgage, a foreign administrator cannot give a right which he cannot exercise himself. This seems also to have been one of the grounds of decision in *Kerr v. Moon*, 6 Wheat. 565. In *Reynolds v. McMullen*, 55 Mich. 568, and in *Sloan v. Frothingham*, 65 Ala. 593, the disability of a foreign administrator was based upon statutory provisions. However applicable this rule may be to mortgages which require proceedings for foreclosure, it is to be noted that the modern form of mortgage, with a power of sale, brings in a new and distinct point to be considered. This point is whether the executor or administrator, acting not strictly in his official capacity as the representative of the deceased mortgagee, but rather as *persona designata*, and so as the appointee of the mortgagor, may not exercise the power by virtue of the contract between the parties. This question was early considered by Chancellor Kent in *Doolittle v. Lewis*, 7 Johns. Ch. 45, where it was held that the whole authority rested upon the convention of the parties and not upon the decision of any court; that the exercise of the power was a matter of contract and not of jurisdiction, since the authority to sell is derived from the power and not from the court of probate of another State. So in *Holcombe v. Richards*, 38 Minn. 38, and in *Hayes v. Frey*, 54 Wisc. 503, it was held that the power was contractual and might be exercised by a foreign executor or administrator. We think the reasoning of these cases is sound. Its adoption carries out the contract of the parties and violates no statute of the State. It prevents conflict of authority, for were an administrator appointed in this State, he might not be able to obtain from the administrator of the domicile of the deceased the evidence of the debt upon which the title under the mortgage must rest.

But it is urged that the mortgagor, upon payment of the debt, is entitled to have the mortgage discharged upon the record. Pub. Stat. R. I. cap. 176, §§ 6, 7, and that this cannot be enforced against a foreign administrator. Neither can it be enforced against a mortgagee who is out of the State; yet no one, on that account, would question his power to sell for a default. It is also urged that the records in this State will not show the appointment of the administrator, and so a purchaser cannot know whether he has the right to sell. There is some force in the objection, but the same trouble may be found in other cases. Suppose a living mortgagee assigns his mortgage, a purchaser must satisfy himself of the identity of the assignee as best he can. So with an executor as the agent of the mortgagor named in the power, the purchaser must satisfy himself of identity and consequent authority in the same way. The executor is simply the appointee in the mortgagor's power of attorney. He is the agent of the mortgagor in making the sale and applying the proceeds. He would naturally give, and would be bound to give, all reasonable information as to his agency,

and there seems to be no more real difficulty in finding out who is making the sale than in any case of a transfer, where the transferee is out of the State.

We are therefore of opinion that the sale by the respondent executor of the mortgagee was in this respect a valid sale, and the case will stand for trial upon the issues of fact.¹

¹ *Acc.* *Holcombe v. Richards*, 38 Minn. 38, 35 N. W. 714; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Waldo v. Milroy*, 19 Wash. 156, 52 Pac. 1012; *Hayes v. Frey*, 54 Wis. 503, 11 N. W. 695. *Contra* (by statute), *Sloan v. Frothingham*, 65 Ala. 593.

A foreign administrator cannot assign a mortgage without power of sale, so as to give his assignee an interest in the land. *Cutter v. Davenport*, 1 Pick. 81; *Dial v. Gary*, 14 S. C. 573. See *Heyward v. Williams*, 57 S. C. 235, 35 S. E. 503.

A "public administrator," not appointed by the Probate Court, but designated by statute to administer estates of deceased persons under certain circumstances, cannot execute the power of sale. *Reynolds v. McMullen*, 55 Mich. 568, 22 N. W. 41.

Where land in a foreign State is devised to an executor, he may maintain ejectment as owner without taking out letters in a foreign State. *Vaughn v. Northup*, 15 Pet. 1; *Chapman v. Headley* (Ky.), 4 S. W. 189. And when he is given by the will power to sell foreign land, he may exercise the power without taking out letters. *Green v. Alden*, 92 Me. 177, 42 Atl. 359; *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020; *Crusoe v. Butler*, 36 Miss. 150; *Newton v. Bronson*, 13 N. Y. 587.

Where the executors are named as trustees, with power of sale, it has been held that a trustee substituted by the court at the domicile of the testator may sell foreign land under the power. *Hoysradt v. Tionesta Gas Co.*, 194 Pa. 251, 45 Atl. 62. — ED.

CHAPTER XIV.

THE ADMINISTRATION OF ESTATES.

SECTION I.

ESTATES OF DECEASED.

STEVENS v. GAYLORD.

was sent to SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1814.

itors; and only [Reported 11 Massachusetts, 256.]

thereon. JACKSON, J.¹ The determination of this cause depends on the sufficiency of the defendant's second plea in bar. In that plea he admits, in effect, that he was indebted to the intestate, as alleged in the declaration, and that the plaintiff is administrator, duly appointed in this State, of the effects of the deceased; but he alleges, in his defence, that before the plaintiff was so appointed administrator, he, the defendant, and one Philemon Gaylord, who were both inhabitants and residents in Connecticut, were duly, and according to the laws of Connecticut, appointed administrators of the effects of the said deceased, by a certain judge of probate there, who had the power of granting such administrations; that they gave bond to the said judge, with condition to exhibit an inventory, and to render their account to him; that they did accordingly exhibit an inventory of all the effects of the deceased, which had come to their knowledge, including therein all the moneys due from the defendant to the deceased on the notes and demands specified in the plaintiff's declaration; by means of all which the defendant is holden and obliged to account to the said judge of probate in Connecticut for all the said moneys.

The plaintiff assigns, as a special cause of his demurrer to this plea, that it is not alleged therein that the said Tibbals, at the time of his decease, or at any time before, resided or had his home in Connecticut; and, on examining the other parts of this record, it appears that such an averment was made in another plea; and being traversed, the issue was found for the plaintiff.

¹ Part of the opinion is omitted. — ED.

We are well satisfied that this point is wholly immaterial in the decision of this cause. The right of granting administration is not confined to the State or country in which the deceased last dwelt. It is very common, and often necessary, that administration be taken out elsewhere. If a foreigner, or a citizen of any other of the United States, dies, leaving debts and effects in this State, these can never be collected by an administrator appointed in the place of his domicil; and we uniformly grant administration to some person here for that purpose. This is the rule of the common law, and it is adopted, as we understand, in most of the United States. [Goodwin v. Jones, 3 Mass. Rep. 514; Dawes v. Boylston, 9 Mass. Rep. 337; Borden v. Borden, 5 Mass. Rep. 67; Langdon *et al.* v. Potter, 11 Mass. 313.]

In such case, however, the administration granted here is considered as merely ancillary to the principal administration, granted in the jurisdiction where the deceased dwelt. It is true that such ancillary administration is not usually granted until an administrator is appointed in the place of the deceased's domicil. But this cannot be a necessary prerequisite; for if so, and it should happen that administration is never granted in the foreign State, the debts due here, under such circumstances, to a deceased person could never be collected; and the debts due from him to citizens of this State might remain unpaid.

The time of granting the respective letters of administration is also immaterial in this case. The administrators in Connecticut, if duly appointed, must collect all the effects of the deceased in that State, whilst the plaintiff will do the like here; and the residue, after paying the debts of the deceased, wherever collected or remaining, must be distributed according to the laws of the State in which the deceased dwelt. If it should appear, upon due examination in our Probate Court, that Tibbals had his home in Connecticut, we should cause the balance remaining in the hands of the administrator here to be distributed according to the laws of Connecticut, or transmitted for distribution by the administrator in Connecticut, under the decree of the Probate Court there. And we cannot doubt that the courts in Connecticut would, under like circumstances, adopt the same principle of comity and justice. Ambler, 25; 2 Vesey, 35; 2 B. & P. 229, *in notis*; Bruce v. Bruce, 9 Mass. Rep. 337; Dawes, Judge, &c. v. Boylston; [Harvey v. Richards, 1 Mass. 381; Dawes v. Head, 3 Pick. 128, 2 Kent. 344; Decouché v. Savetier, 3 Johns. Ch. 310; Dixon v. Ramsay, 3 Cran. 319; United States v. Crosby, 7 Cran. 115; Bruce v. Bruce, 2 B. & P. 229.]

Having disposed of these two subordinate points, the great question in the cause still remains, — whether, if the debtor of an intestate be duly appointed administrator in another State, that circumstance, together with the others stated in this plea, furnishes a sufficient defence.¹ . . .

It was suggested in the argument, that the notes on which this action

¹ The learned judge held that the defence stated in the plea was a good one. — Ed.

is brought were in this State at the death of the intestate. This fact does not appear on the record; and, if material, it should have been pleaded. But if the notes were here, the debtor being a citizen of Connecticut, might be effectually discharged by a release from any administrator in Connecticut having lawful authority to receive the debt. And, further, the notes, under such circumstances, could never be recovered, in the ordinary course of things, without being sent to Connecticut, and demanded by an administrator duly appointed there.

The circumstance of the defendant's having come into this State, so as to expose himself to this action, cannot affect the general principle. The law would be the same if that contingency had not happened; in which case the debtor could never be compelled to pay but to an administrator duly authorized in Connecticut; and of course a release given to him by such an administrator would bar any subsequent action for the same debt.

Another reason why this money should be accounted for in Connecticut is, that all the effects of the deceased are liable, in the first instance, to his creditors there. No principle of comity requires of that government to lend their aid in collecting the effects of the deceased, and to send those effects out of their country, whilst any of their citizens have just and legal claims upon the fund. This debt, then, was assets, liable to the claims of all creditors, citizens of Connecticut, and they ought not to be deprived of this advantage merely because the debtor is himself appointed administrator. . . .

*Defendant's plea good.*¹

in

FAY v. HAVEN.

recovered

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

status

in Mass.

[*Reported 3 Metcalf, 109.*]

a DEBT on a probate bond, dated September 1, 1835, given by Thomas Haven, as principal, and the other defendants, as sureties, for the faithful performance by Haven of his duties as administrator of the estate of Samuel Livermore, late of New Orleans in the State of Louisiana.²

¹ The appointment of an ancillary administrator will not be made (in the absence of a statute requiring it) if it is not necessary for the proper distribution of the assets. *Washburn's Estate*, 45 Minn. 242, 47 N. W. 790. The principal administrator cannot demand the appointment. *In re Estate of Neubert*, 58 S. C. 469, 36 S. E. 908.

A testator may, however, name two executors, one to act in each of two States; and each will then have, in the State in which he is named to act, such right to act as any executor named. *Sherman v. Page*, 21 Hun, 65.

The cases, almost without exception, treat a foreign executor and administrator in the same way. The few cases which suggest a distinction, in some respects, between their powers probably do not represent the law. See, for instance, *Winchester v. Bank*, 2 G. & J. 80; *Grant v. Reese*, 94 N. C. 720. — Ed.

² Statement of facts is omitted. — Ed.

DEWEY, J. That this action may be maintained for such a breach of this bond as will authorize a judgment for nominal damages, seems to us to be very clear. The Rev. Sts. c. 68, § 25, authorize such action, "if any executor or administrator shall neglect to render and settle his accounts in the probate court within six months after the return made by the commissioners, or after the final liquidation of the demands of the creditors, or within such further time as the judge of probate shall allow therefor, so as to delay a decree of distribution." The facts stated in the case show such neglect of the administrator to render and settle his accounts within the time limited by the statute.

It was suggested by the defendants' counsel, that an executor or administrator is not liable to an action unless he has neglected to render and settle his account, after having been first cited by the judge of probate to render it. Such is the provision of c. 67, § 9, providing the remedy for neglect to render and settle the accounts of administrators in cases of solvent estates; but we think it does not apply to cases like the present, which seem to be specially provided for in c. 68, § 25, and where the mere neglect to render the account, within the period prescribed by the statute, subjects the administrator to a suit, without any previous citation from the judge of probate.

The question of more difficulty in the present case is that which arises upon the claim of the plaintiff, in behalf of the creditors in Massachusetts, to hold the defendant responsible upon this bond for certain property of said Livermore, deceased, which came into the hands of said Haven (the principal in this bond), in the State of Louisiana, by virtue of his appointment as one of the executors of said Livermore, and his subsequent appointment, by the court of probate there, as tutor to his children, who were legatees under the will.

By the facts stated by the parties, it appears, that Samuel Livermore had been for many years a resident in New Orleans, and had his domicile there at the time of his decease; that said Haven and one Ogden were constituted executors of his will and duly authorized to act, as such, under the laws of Louisiana, and that the property, for which it is now attempted to make the defendants chargeable, on the bond, to the plaintiff as judge of probate for the county of Middlesex, is the avails of certain personal and real estate, which came to the hands of said Haven in the State of Louisiana, under the authority of the Probate Court of New Orleans, received and held by him, either in the capacity of executor in Louisiana, or as a tutor legally constituted there, to hold the same for the benefit of his children, or to a small amount, held as payment of a legacy to his wife under the said will. No specific property of said Livermore is or has been in the hands of said Haven in this Commonwealth, except the valuable collection of books received by the corporation of Harvard College, by virtue of a specific bequest to them by Mr. Livermore (and which the executors transmitted from Louisiana), and certain real estate which was duly returned in the inventory taken here.

It is very obvious that the disposition of both the personal and real estate of Livermore, the avails of which came to the hands of Haven, was to be regulated by the Laws of Louisiana; personal estate being always to be disposed of according to the *lex domicilii*, and the real estate by the *lex loci rei sitæ*. Story's Conflict of Laws, 403, 404. The administration granted in Massachusetts was merely ancillary, and the only duty devolving upon such administrator would be to collect the assets here, and appropriate so much of the avails of the same to the payment of debts due to our citizens, as would be authorized by the general solvency or insolvency of the estate of the deceased, and remit the balance to the place of principal administration. *Davis v. Estey*, 8 Pick. 475. It has been, I apprehend, the uniform doctrine of this court, that any other administration than that granted where the deceased had his domicile must be considered as an ancillary administration. *Stevens v. Gaylord*, 11 Mass. 256. Such ancillary administrator would not be obliged to account here for assets received in the place of principal administration, although he had filed a copy of the will and taken letters of administration in this Commonwealth. *Selectmen of Boston v. Boylston*, 2 Mass. 384. *Campbell v. Sheldon*, 13 Pick. 23. But, contrary to this doctrine, it is now contended that the administrator may be required to account, at the place of the ancillary administration, for the property of the deceased which was found at the place of his domicile and principal administration, for the purpose of subjecting it to the payment of debts due to creditors in Massachusetts; and this too after the property has been changed in its specific character, and the proceeds thereof have been, by order of the Probate Court in Louisiana, vested in the defendant, Haven, in another and different capacity from that of executor.

The position, thus urged by the counsel for the plaintiff, seems, as already suggested, at variance with the principles which are recognized by the authorities already cited, as well as other cases that may be referred to. *Richards v. Dutch*, 8 Mass. 506; *Dawes v. Boylston*, 9 Mass. 337; *Jennison v. Hapgood*, 10 Pick. 78; *Vaughan v. Northup*, 15 Pet. 1.

The rule seems to have been very generally sanctioned, that as to the property in the hands of the executor or administrator, acquired without the jurisdiction of the principal administration, he is to be held accountable for its proper application only to the legal tribunals of the State in which the principal administration was taken.

The questions which have been sometimes raised, and which have been of more difficult solution, have been as to the authority of the ancillary administrator to retain and apply the property, received within his local jurisdiction, to the payment of debts or legacies due to creditors and legatees residing within that jurisdiction.

Some reliance was placed by the counsel for the plaintiff upon the decision of the Supreme Court of New York, in the case of *Campbell v. Tousey*, 7 Cow. 64, where it was held, that if a foreign executor, coming

into that State, without filing a copy of the will and taking an appointment under the authority there, should intermeddle with the goods of the deceased in New York, and thus make himself an executor *de son tort*, he should also be charged with the assets remaining in his hands, though received in a foreign country. This decision, as well as the general question of conflicting administrators, is considered by Mr. Justice Story, in his learned commentaries on the Conflict of Laws, 424-429. He doubts the correctness of the decision in *Campbell v. Tousey*, and says "there is great difficulty in supporting it, to the extent of making the foreign executor or administrator liable, in such State, for assets received abroad and brought into the State by him. It is not easy to perceive how he can be sued in such State for assets in his hands received abroad under the sanction of a foreign administration, and by the authority of the foreign government to which he is accountable for all such assets."

It seems to be highly reasonable and proper that the accountability of the administrator, for all assets received under an appointment in one State, should be exclusively under the laws and judicial decisions of the State conferring upon him the power and authority to act in this behalf; and that all questions as to the faithful or unfaithful discharge of his duties as such administrator should be limited to the same local jurisdiction. If it were not so, obviously great confusion would arise, and conflicting decisions might be made, requiring inconsistent duties of the administrator. Nor can we think that the omission in the statutes of Louisiana, of the requisition of bonds from the administrator for the faithful discharge of his trust, can vary the general principle. The nature and extent of the security to be given in such cases must necessarily be regulated by the local law. We are to presume that such laws are in force in Louisiana, as furnish reasonable security to the parties in interest, and that in some form, through the aid of legal process, the avails of the estate of one deceased may be reached, or the executor be restrained in any attempt to withdraw the same, or to place himself beyond the jurisdiction of her courts, while his liabilities to creditors are undischarged. Indeed the records of the court of probate of New Orleans, in this case, and the civil code of Louisiana, to which we have been referred, both show various proceedings in the cases of settlement of estates, having for their object the proper application of the assets to the payment of the debts of deceased persons. The remedy, it is true, may be lost by delay or laches of the creditor in enforcing his claim, and the proceedings may be closed in a shorter time than would be consonant with the laws of Massachusetts; but this cannot affect the general principle as to the liabilities of the foreign administrator in our courts.

Upon the whole matter, the court are of opinion that the defendants are not liable upon this bond to the judge of probate in this county, for any assets received in the State of Louisiana; the property thus received, having been already administered upon in that State. If the

settlement of the estate is not closed there, proceedings may be instituted there against the legal representatives to enforce any valid claims existing on behalf of creditors. If not enforced in due time, the creditors may have lost their remedy by their own laches.

The books in possession of Harvard College were transmitted to the donees from Louisiana, and the estate at the place of principal administration being solvent, they were properly transmitted by the executors, agreeably to the bequest of the testator; and this being a proper and legal disposition of them under the authority and laws of Louisiana, they are not assets to be accounted for by the administrator in this Commonwealth.

The administrator is not to be charged with the real estate returned in the inventory, or be made liable by reason of any neglect to procure license to sell the same; this court having, upon an application duly made by him for such license, refused to grant it. *Livermore v. Haven*, 23 Pick. 116. The result is, therefore, that the plaintiff is entitled to a judgment for only nominal damages.¹

*To administer the estate of a decedent in Mass.
in insolvency. Suit in Mass.
It was N.H. ADAMS v. BATCHELDER.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1899.

admin [Reported 173 Massachusetts, 258.]

HOLMES, J. This is an action of contract brought upon a New Hampshire judgment obtained by a man domiciled in New Hampshire, upon a debt contracted in New Hampshire, against a resident of Massachusetts. The judgment creditor died, and the present plaintiff, also a resident of New Hampshire, was appointed his administratrix there. On April 18, 1881, the plaintiff was appointed ancillary administratrix in Massachusetts. On January 21, 1891, the defendant received a discharge in insolvency in Massachusetts. At the trial there was evidence that the debt never had been paid, but the judge ruled that the discharge was a bar to the action. The case is here upon an exception to that ruling.

The ruling raises the question whether the debt is to be regarded as due to a person resident in Massachusetts, within the meaning of Pub.

¹ *Acc. Preston v. Melville*, 8 Cl. & F. 1; *Lewis v. Grognaud*, 17 N. J. Eq. 425; *Freeman's Appeal*, 68 Pa. 151; *Hamilton v. Carrington*, 41 S. C. 385, 19 S. E. 616 (but see *Cureton v. Mills*, 13 S. C. 409). Compare *Grant v. Reese*, 94 N. C. 720.

If without securing an appointment in another State an administrator takes assets there, it seems clear that he is accountable for the assets to the court which appointed him. *McPike v. McPike*, 111 Mo. 216, 20 S. W. 12. *Contra*, *Mothland v. Wireman*, 3 Pen. & W. 185. The sureties on his bond have also been held accountable for such assets. *Andrews v. Avory*, 14 Grat. 229. *Contra*, *Fletcher v. Sanders*, 7 Dana, 345 (sureties of an ancillary administrator).

Sts. c. 157, § 81. The defendant's position is that, as the debt could not be collected except by taking out ancillary administration here, it must be taken to be due to the plaintiff in her capacity of ancillary administratrix, and not as a natural person; and that, as that office has its birth and life in Massachusetts, the plaintiff in that capacity has her residence here, just as a corporation has its domicil in the State which created it. *Bergner & Engel Brewing Co. v. Dreyfus*, 172 Mass. 154. But this argument is working a fiction too hard. An executor or administrator is not a corporation sole. He gets his title or his succession to the rights of the deceased by his appointment, it is true. Nowadays he holds those rights in a fiduciary capacity, and he must account for what he receives. But there is no absolute separation of his artificial from his natural personality, as is shown by the fact that a suit against an executor may end in a judgment *de bonis propriis*, either at common law or under Pub. Sts. c. 166, § 10, and very frequently may lead to a personal judgment for costs, as also that in general his contracts as such bind him only personally, even when he is entitled to indemnity from the estate. *Durkin v. Langley*, 167 Mass. 577. A judgment recovered by an administrator is payable to him personally, and may be sued on by him in another State. *Talmage v. Chapel*, 16 Mass. 71. And it has been held that, when a chattel is taken from an administrator wrongfully, he may sue for it in another State into which it has been carried. *Crawford v. Graves*, 15 La. Ann. 243. Story, *Conf. of Laws*, § 515. Dicey, *Conf. of Laws*, 459, 460. See *Commonwealth v. Griffith*, 2 Pick. 11, 18. What is true of an executor is even more plainly true of an ancillary administrator. And as one person can have but one domicil, unless the law for this purpose treats the woman and the ancillary administratrix as two persons, the plaintiff is a resident of New Hampshire, since no one would contend that her residence was changed for all purposes by her merely accepting an appointment here.

In the present case there is also another consideration. The debt was not suspended until the appointment of the ancillary administratrix. It was the property of the principal administratrix so far that a payment to her would have been a bar to the present action: *Wilkins v. Ellett*, 9 Wall. 740; s. c. 108 U. S. 256; see Story, *Conf. of Laws*, § 515, n.; Dicey, *Conf. of Laws*, 461; or that the debt could have been sued for and collected there before the ancillary letters were issued, and that, if collected in Massachusetts, it would be transmitted to New Hampshire and accounted for there, unless there happened to be local claims against the estate. We presume that the right to sue the debtor in New Hampshire, if service could be got there, was not affected by the ancillary appointment. As is said in *Wilkins v. Ellett*, 108 U. S. 256, 258, the objection to the principal administratrix's bringing an action here "does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him."

See *Hutchins v. State Bank*, 12 Met. 421, 425; *Anthony v. Anthony*, 161 Mass. 343, 351, 352; *Swift, C. J.*, in *Slocum v. Sanford*, 2 Conn. 533, 535.

Perhaps this branch of the argument so far is not unanswerable. But there is the further fact that the debt already had been reduced to judgment. Whatever may be the law as to simple contract debts, it was laid down three centuries ago, and still is repeated, that judgments are *bona notabilia* where the judgment was given. As applied to this case, at least, we may accept the statement. *Sir John Needham's case*, in note to *Daniel v. Luker*, Dyer, 305; *Kegg v. Horton*, 1 Lutw. 399, 401; *Gold v. Strode*, 3 Mod. 324; *Adams v. Savage*, Ld. Raym. 854; *Attorney-General v. Bouwens*, 4 M. & W. 171, 191; *Holcomb v. Phelps*, 16 Conn. 127, 135; 1 Wms. Saund. 274 a, n. 3. Taking all the elements into account, it seems to us that in this case, if ever, "the [administratrix] here is only the deputy or agent of the [administratrix] abroad." *Dawes v. Head*, 3 Pick. 128, 141, 142. See also *Merrill v. New England Ins. Co.*, 103 Mass. 245, 248.

Whichever of the foregoing lines of thought we pursue, we are led to the conclusion that the debt is not barred. If we treat the debt as due to the ancillary administratrix, we cannot so far distinguish between her natural and her artificial person, in the present state of the law, as to say that she resides in Massachusetts as administratrix when as a woman she resides in New Hampshire. If we are to consider the question of title more nicely, the debt belongs to the principal administratrix, although she may not receive it except subject to local debts of the estate.

Exceptions sustained.

*payable on shares in
certificates were at death
time.*

STERN v. QUEEN.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1896.

[Reported [1896] 1 *Queen's Bench*, 211.]

THIS was a petition of right brought by the suppliants, executors of Baron Herman de Stern, for a return of the sum of £8,187, being the amount of probate duty paid upon certain shares in American railway companies, the certificates for which shares were in England at the testator's death.¹

WRIGHT, J. In this matter the case finds that the certificates, the value of which is in question in this petition of right, were documents of title held by the shareholders in certain foreign companies, which certificates certify that the person therein named is entitled to the number of shares named, and so forth. Upon every certificate there is

¹ This short statement is substituted for that of the Reporter. Arguments of counsel are omitted. — ED.

indorsed a form of transfer and a power of attorney in blank. Then paragraph 8 repeats with regard to this case most of the judicial statements of fact or inferences of fact which were drawn in the House of Lords in the case of *Colonial Bank v. Cady*, 15 App. Cas. 267. I think that the true inference to be drawn from the statements made in the case is that the duty has properly been claimed and paid upon these documents. It is not a matter that is susceptible of any lengthened statement; but the way I put it is this. There is in this country within the jurisdiction of the Ordinary (now the Probate Court) a document the existence of which vouches and is necessary for vouching the title of some one to the foreign share, so that in the absence of that document no one at all could establish a title to the share. It is found by the case that the certificates are currently marketable here as securities for that share and the dividends payable on that share; it is found, in fact, that the delivery of the certificate in this country *ipso facto* affects the title in a sense that it entitles the transferee to all the transferor's rights. It follows that the certificate itself has some operative power here, and it seems to me not to be within the ancient rule that a simple contract debt or mere evidences of a simple contract debt are supposed to exist only at the place of the debtor's residence. It being a marketable security operative, though not completely operative, to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value in the hands of the executors within the jurisdiction of the Ordinary. Therefore I think that the Crown is entitled to succeed.

KENNEDY, J. I agree, and for the same reasons.

Judgment accordingly.

PINNEY v. MCGREGORY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[*Reported 102 Massachusetts, 186.*]

CONTRACT by the plaintiff as administrator of the estate of Rufus G. Pinney, late of Stafford in the State of Connecticut, upon several promissory notes made by the defendants, payable to the order of the intestate and overdue. The notes were found in Connecticut after the death of the intestate. The plaintiff was appointed administrator by the probate court for the county of Hampden in this Commonwealth. One of the defendants was a resident of the county at the time administration was granted, but not at the death of the intestate. The judge at the trial ruled that no action could be maintained by the plaintiff because the probate court had no jurisdiction; and directed a verdict for the defendants. If this ruling was correct, judgment was to be entered

upon the verdict, otherwise the verdict to be set aside and judgment entered for the plaintiff.¹

GRAY, J. . . . We prefer to rest the jurisdiction of the Probate Court upon the residence of a debtor to the intestate in this county at the time of the grant of administration.

By the law of England, simple contract debts due to the deceased are *bona notabilia* in the diocese where the debtor resides.² It is said indeed in the text-books of approved authority, that the debtor must have resided there at the time of the intestate's death, though we do not find that this has been expressly adjudged. 1 Williams on Executors, 279, and authorities cited. The canons of 1 James I. (1603) upon the subject, however, speak of the deceased being "at the time of his death" possessed of goods and chattels or good debts in any other diocese or peculiar jurisdiction than that in which he died. *Ib.* 267, 268. But it is observable that, in the leading cases in the courts of common law, in which the administration granted in one county was declared void, the allegation was that the debtor resided in another county not only at the time of his death, but also ever since, or at the time of the grant of administration. *Yeomans v. Bradshaw*, Carth. 373; s. c. 3 Salk. 70, 164, 12 Mod. 107, Comb. 392, Holt, 42; *Hilliard v. Cox*, 1 Salk. 37; s. c. 2 Salk. 747, 1 Ld. Raym. 562, 3 Ld. Raym. 313. And in the case of *Yockney v. Foyster*, cited and ap-

¹ This short statement is substituted for that of the Reporter. Only so much of the opinion is given as deals with the subject of jurisdiction based on residence of the defendants. — ED.

² A simple contract debt is assets where the debtor resides: *Arnold v. Arnold*, 62 Ga. 627; *Burbank v. Payne*, 17 La. Ann. 15; *Emery v. Hildreth*, 2 Gray, 228; *Sayre v. Helme*, 61 Pa. 299; and this, though a bill or note has been given for the amount of it: *Yeoman v. Bradshaw*, Carth. 373, 3 Salk. 70; *Wyman v. Halstead*, 109 U. S. 654; *Slocum v. Sanford*, 2 Conn. 533; *Chapman v. Fish*, 6 Hill 554; but see *McNamara v. McNamara*, 62 Ga. 200; *Thorman v. Broderick*, 52 La. Ann. 1298, 27 So. 735; *Goodlett v. Anderson*, 7 Lea, 289. So of a judgment debt. *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125; *Swancy v. Scott*, 9 Humph. 327; see *Du Val v. Marshall*, 30 Ark. 230. So of a claim to a share of the profits of a partnership. *Shaw's Estate*, 81 Me. 207, 16 Atl. 662 (*semble*); *Jones v. Warren*, 70 Miss. 227, 14 So. 25. So of a right to recover damages. *Hartford & N. H. R. R. v. Andrews*, 36 Conn. 213; *Missouri Pacific R. R. v. Lewis*, 24 Neb. 848; *contra*, *Jeffersonville R. R. v. Swayne*, 26 Ind. 477; *Perry v. S. J. & W. R. R.*, 29 Kan. 420.

A bond, on the other hand, is assets where it is found. *Daniel v. Luker*, Dyer, 305; *Barclift v. Treece*, 77 Ala. 523; *Beers v. Shannon*, 73 N. Y. 292; and see *Grant v. Rogers*, 94 N. C. 755. In *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61, it was held that notes and bonds found within a State were not "property in this State" within the meaning of a statute. See *Speed v. Kelly*, 59 Miss. 47.

Shares of stock in a corporation are usually held to be assets where the stock-books are kept. *Attorney-General v. New York Breweries Co.*, [1898] 1 Q. B. 205; *Grayson v. Robertson*, 122 Ala. 330, 25 So. 229; *Arnold v. Arnold*, 62 Ga. 627; *Washburn's Estate*, 45 Minn. 242, 47 N. W. 790 (*semble*). In *Russell v. Hooker*, 67 Conn. 24, 34 Atl. 711, they were held to be assets at the domicile of the deceased, where they were found.

In *Epping v. Robinson*, 21 Fla. 36, bills and notes and written contracts were held *bona notabilia* where found. — ED.

proved by Sir John Nicholl in *Scarth v. Bishop of London*, 1 Hagg. Eccl. 636, 637, in which the only effects within the province were brought there after the death of the party, Sir William Wynne held that, if the court of chancery had held a grant of probate there to be necessary in order to file a bill in equity to recover the property, the ecclesiastical court "in aid of justice" might grant letters of administration.

Our statute declares that "the Probate Court for each county shall have jurisdiction of the probate of wills, granting administration of the estates of persons who at the time of their decease were inhabitants of or resident in the county, and of persons who die without the State, leaving estates to be administered within such county." Gen. Sts. c. 117, § 2. It does not in terms say "leaving estate in such county at the time of their decease." The section embodies the Rev. Sts. c. 64, § 3, and c. 83, § 5, which were substantial re-enactments of the St. of 1817, c. 190, §§ 1, 16. In *Picquet, Appellant*, 5 Pick. 65, the court held that the earliest of these statutes should receive a liberal construction to enable the representatives of deceased foreign creditors to collect the debts of the deceased here in the only way in which by our laws they could be recovered, that is to say, through the power of administration granted by the laws of this Commonwealth; and that a debt due from a citizen of this Commonwealth to a foreign subject at the time of his death should therefore be deemed estate left by him in this Commonwealth, within the meaning of that statute. The same rule of construction must be applied to this case. *

Indeed the St. of 1817, c. 190, § 16 (which included the estates of intestates already deceased, as well as of those who might die in the future), would seem to point to the time of a petition for administration rather than the time of the death, as the time at which there must be estate within the county, in order to give jurisdiction; for the words are, "when any person who has died or shall die intestate without the Commonwealth shall leave estate of any description within the same to be administered," letters of administration may be applied for as if he had died within the Commonwealth, and the judge of probate of any county "wherein such estate shall be found" shall have power to grant them. But it is not necessary to rely upon so narrow an argument.

Before that statute, the probate courts of the Commonwealth exercised the jurisdiction of granting administration on property belonging or debts due to persons residing abroad, in order to enable them to be collected in this State, because without such appointment no suit could be brought in our courts for the assets or debts of the deceased, either in the courts of the Commonwealth or of the United States. *Goodwin v. Jones*, 3 Mass. 514; *Stevens v. Gaylord*, 11 Mass. 256; *Picquet v. Swan*, 3 Mass. 469; *Noonan v. Bradley*, 9 Wall. 394. In *Dawes v. Boylston*, 9 Mass. 337, and *Wheelock v. Pierce*, 6 Cush. 288, it seems to have been assumed that a debtor or goods of the intestate coming or being brought into the Commonwealth after the death of the testator would give jurisdiction to support an administration. The

dictum of Mr. Justice Bigelow in *Bowdoin v. Holland*, 10 Cush. 18, that "it is undoubtedly true that if the deceased had at the time of his death neither domicile nor assets within the Commonwealth, the judge of probate had no jurisdiction in the premises," is not to be taken in its strictest sense. It was there held that *prima facie* evidence that a deceased nonresident had conveyed real estate in this Commonwealth in fraud of his creditors was sufficient to warrant the grant of administration here, even if no similar grant had been made in the State of his domicile; and the question asked by the learned judge upon that point is equally applicable to this. "If the will is never proved in the place of the testator's domicile, and is purposely withheld from probate, have creditors in this State no means of procuring administration on their deceased debtor's estate, and thereby reaching his property here?" To limit the power of granting administration to cases in which the goods are or the debtor resides in the Commonwealth at the time of the death of the intestate would be to deny to the creditors and representatives of the deceased, whether citizens of this or of another State, all remedy whenever goods are brought into this State, or a debtor takes up his residence here, after the death of the intestate. The more liberal construction of the statute is necessary to prevent a failure of justice.¹

WILKINS v. ELLETT.

SUPREME COURT OF THE UNITED STATES. 1883.

[Reported 108 *United States*, 256.]

GRAY, J. This is an action of assumpsit on the common counts, brought in the Circuit Court of the United States for the Western District of Tennessee. The plaintiff is a citizen of Virginia, and sues as administrator, appointed in Tennessee, of the estate of Thomas N. Quarles. The defendant is a citizen of Tennessee, and surviving partner of the firm of F. H. Clark & Company. The answer sets up that Quarles was a citizen of Alabama at the time of his death; that the sum sued for has been paid to William Goodloe, appointed his administrator in that State, and has been inventoried and accounted for by him upon a

¹ *Acc.* *Saunders v. Weston*, 74 Me. 85; *Low v. Horner*, 10 Hawaii, 531. So administration may be granted upon chattels brought into the State, whether rightfully or wrongfully, after the death of the owner. *Stearns v. Wright*, 51 N. H. 600; *In re Hughes*, 95 N. Y. 55; *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125 (*semble*); *Green v. Rugely*, 23 Tex. 539. *Contra*, *Embry v. Millar*, 1 A. K. Marsh, 300.

But where the property is taken into the foreign State by an agent of the domiciliary administrator for a temporary purpose, as for sale or transmission, the State into which it is taken can exercise no control over it as against the domiciliary administrator. *Crescent City Ice Co. v. Stafford*, 3 Woods 94, Fed. Cas. 3387; *Wells v. Miller*, 45 Ill. 382; *In re Schley's Estate*, 11 Phila. 139. This is clearly true where the goods are returned or sold before an ancillary administrator is appointed. *Christy v. Vest*, 36 Ia. 285; *Martin v. Gage*, 147 Mass. 204, 17 N. E. 310. — ED.

final settlement of his administration; and that there are no creditors of Quarles in Tennessee. The undisputed facts, appearing by the bill of exceptions, are as follows:—

Quarles was born at Richmond, Virginia, in 1835. In 1839 his mother, a widow, removed with him, her only child, to Courtland, Alabama. They lived there together until 1856, and she made her home there until her death in 1864. In 1856 he went to Memphis, Tennessee, and there entered the employment of F. H. Clark & Company, and continued in their employ as a clerk, making no investments himself, but leaving his surplus earnings on interest in their hands, until January, 1866, when he went to the house of a cousin in Courtland, Alabama, and while there died by an accident, leaving personal estate in Alabama. On the 27th of January, 1866, Goodloe took out letters of administration in Alabama, and in February, 1866, went to Memphis, and there, upon exhibiting his letters of administration, received from the defendant the sum of money due to Quarles, amounting to \$3,455.22 (which is the same for which this suit is brought), and included it in his inventory, and in his final account, which was allowed by the Probate Court in Alabama. There were no debts due from Quarles in Tennessee. All his next of kin resided in Virginia or in Alabama; and no administration was taken out on his estate in Tennessee until June, 1866, when letters of administration were there issued to the plaintiff.

There was conflicting evidence upon the question whether the domicile of Quarles at the time of his death was in Alabama or in Tennessee. The jury found that it was in Tennessee, under instructions, the correctness of which we are not prepared to affirm, but need not consider, because assuming them to be correct, we are of opinion that the court erred in instructing the jury that, if the domicile was in Tennessee, they must find for the plaintiff; and in refusing to instruct them, as requested by the defendant, that the payment to the Alabama administrator before the appointment of one in Tennessee, and there being no Tennessee creditors, was a valid discharge of the defendant, without reference to the domicile.

There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his domicile at the time of his death; that the proper place for the principal administration of his estate is that domicile; that administration may also be taken out in any place in which he leaves personal property; and that no suit for the recovery of a debt due to him at the time of his death can be brought by an administrator as such in any State in which he has not taken out administration.

But the reason for this last rule is the protection of the rights of citizens of the State in which the suit is brought; and the objection does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him.

If a debtor, residing in another State, comes into the State in which the administrator has been appointed, and there pays him, the payment is a valid discharge everywhere. If the debtor being in that State, is there sued by the administrator, and judgment recovered against him, the administrator may bring suit in his own name upon that judgment in the State where the debtor resides. *Talmage v. Chapel*, 16 Mass. 71; *Biddle v. Wilkins*, 1 Pet. 686.

The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer, and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another State, if the debts are negotiable promissory notes, or if the law of the State in which the action is brought permits the assignee of a chose in action to sue in his own name. *Harper v. Butler*, 2 Pet. 239; *Shaw, C. J.*, in *Rand v. Hubbard*, 4 Met. 252, 258-260; *Petersen v. Chemical Bank*, 32 N. Y. 21. And on a note made to the intestate, payable to bearer, an administrator appointed in one State may sue in his own name in another State. *Barrett v. Barrett*, 8 Greenl. 353; *Robinson v. Crandall*, 9 Wend. 425.

In accordance with these views, it was held by this court, when this case was before it after a former trial, at which the domicile of the intestate appeared to have been in Alabama, that the payment in Tennessee to the Alabama administrator was good as against the administrator afterwards appointed in Tennessee. *Wilkins v. Ellett*, 9 Wall. 740.

The fact that the domicile of the intestate has now been found by the jury to be in Tennessee does not appear to us to make any difference. There are neither creditors nor next of kin in Tennessee. The Alabama administrator has inventoried and accounted for the amount of this debt in Alabama. The distribution among the next of kin, whether made in Alabama or in Tennessee, must be according to the law of the domicile; and it has not been suggested that there is any difference between the laws of the two States in that regard.

The judgment must therefore be reversed, and the case remanded with directions to set aside the verdict and to order a *New trial*.¹

¹ *Acc. Selleck v. Rusco*, 46 Conn. 370; *Citizens' Nat. Bank v. Sharp*, 53 Md. 521; *Dexter v. Berge*, 76 Minn. 216, 78 N. W. 1111; *Riley v. Moseley*, 44 Miss. 37; *Parsons v. Lyman*, 20 N. Y. 103; *Gray's Appeal*, 116 Pa. 256; 11 Atl. 66. *Contra*, *Vaughn v. Barret*, 5 Vt. 333. As against later claims of domestic creditors such payment is not a good discharge. *Ferguson v. Morris*, 67 Ala. 389.

But where an English company transferred shares of an American testator to his executor, the latter was held *executor de son tort* and liable to probate duty in England. *Attorney-General v. New York Breweries Co.*, [1898] 1 Q. B. 205. *Contra*, *Citizens' Nat. Bank v. Sharp*, 53 Md. 521: And where a foreign administrator took assets, he was held in an early case as *executor de son tort* in favor of the creditors. *Riley v. Riley*, 3 Day 74. See *Hopkins v. Town*, 4 B. Mon. 124. — Ed.

SHAKESPEARE v. FIDELITY INSURANCE, TRUST & SAFE
DEPOSIT CO.

SUPREME COURT OF PENNSYLVANIA. 1881.

[Reported 97 Pennsylvania, 173.]

THIS was an action of trover by the administrator *de bonis non, cum testamento annexo* of the estate of John B. Ackley deceased, against The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, for certain United States coupon bonds deposited with the defendants by the testator in his lifetime for safe-keeping on special certificate of deposit which by its terms must be surrendered upon withdrawal of the deposit. The testator left the certificate, at his death, in New Jersey, his domicil, and it was presented by the New Jersey executor to the defendant, and the bonds surrendered in exchange for it. The plaintiff having been appointed administrator in Pennsylvania, demanded the bonds, and upon refusal brought this suit. The court entered judgment for the defendant upon the point reserved, viz., Is the plaintiff entitled to recover upon these facts? The plaintiff took a writ of error.¹

SHARSWOOD, C. J. We do not consider that the United States coupon bonds which are the subjects of this controversy were, at the time of the death of the decedent, any part of his estate in this Commonwealth. The defendants were the mere depositaries of the bonds for safe-keeping. They were, therefore, in the possession of the decedent. He held the certificate of their deposit. The defendants were bound to restore the bonds at any time to the lawful holder of the certificate. It was as if the bonds had been placed in a fire-proof of the defendants, of which the decedent possessed the key. In point of fact, the certificate was in the actual possession of the widow of the decedent in New Jersey. She surrendered it as she was bound to do, to the foreign executor. She could not have withheld it. The New Jersey executor could have sued her, and compelled its delivery to him. The Pennsylvania administrator certainly could not. By the terms of the certificate it might be transferred by assignment indorsed thereon and approved by the company. The foreign executor could have so assigned it, and his assignee could have sued for the delivery of the bonds, in his own name. The assignment would have been a sale of the bonds, which were payable to bearer, and passed by delivery. Whoever showed a legal title to the certificate had a right to the possession of the bonds. The case, then, is within the principle of *Moore v. Fields*, 6 Wright, 471, where it was held that, where a debt fixed by a decree or judgment of the court of

¹ This short statement is substituted for that of the Reporter. Part of the opinion, in which the statute fixing the powers of foreign executors was held not to apply, is omitted. — ED.

another State in favor of a foreign administrator, is due by citizens of Pennsylvania to the estate of a decedent, the administrator of the foreign domicile may sue for and recover it in his own name.

*Judgment affirmed.*¹

Am
AMSDEN v. DANIELSON.

demurrer;
SUPREME COURT OF RHODE ISLAND. 1895.

[Reported 18 *Rhode Island*, 787.]

STINESS, J. The plaintiff, executor of the will of Lucretia C. Danielson, late of Providence, deceased, sues the defendant, a resident of Killingly, Connecticut, upon a promissory note, made by him, dated at said Killingly, and payable to the testatrix. The action was commenced January 12, 1894, by an attachment of real estate of the defendant in the city of Providence in this State. It appears by the defendant's plea that after said will was probated here, and since the commencement of this suit, a copy of the will was recorded in Killingly and William H. Chollar was appointed administrator, who has qualified, and to whom the defendant has made payment of the amount due on the note. To this the plaintiff replies that there was no property in Connecticut except a trifling amount of furniture, which had been fully administered by him before the application to record the will in Killingly; that there were no creditors in Connecticut; that the defendant, knowing the intention of the plaintiff to bring suit here, induced the plaintiff to forbear his suit by promising to pay the debt on a certain day, and thereupon, contriving to prevent said attachment and to evade the payment of the note, took advantage of the plaintiff's forbearance and procured the recording of the will and the appointment of Chollar as administrator in Connecticut; that the note is and has been, since the death of the testatrix, in the plaintiff's possession, upon which the defendant paid him the sum of \$234.20 in October, 1893, and that the defendant had notice of the attachment before he made the payment to Chollar as administrator. The defendant demurs to the replications.

The main question raised by the pleadings is whether under these circumstances the suit can be maintained in Rhode Island, after the payment to the administrator in Connecticut. We think it can be maintained. First the fact is set up that this was a voluntary and collusive payment, which upon demurrer must be taken to be true. While a party will be protected from paying a second time that which he has once in good faith been compelled to pay, it is clear that these facts do

¹ In *McCully v. Cooper*, 114 Cal. 258, 46 Pac. 82, where a foreign administrator having a certificate of deposit demanded payment and was refused, it was held to be his duty to surrender the certificate to the domestic administrator, that the latter might sue upon it. — ED.

not make such a case. A person cannot oust the court of one State of jurisdiction by a collusive judgment, and much less by a voluntary payment, in another. So it has been held that where a man, by wilful default, has suffered judgment to go against him as garnishee, in another State, when he might have prevented it, a payment is no bar in the State where a suit upon the claim had been previously commenced. *Whipple v. Robbins*, 97 Mass. 107; *Wilkinson v. Hall*, 6 Gray, 568. See also *Hull v. Blake*, 13 Mass. 153, 157, and *Stevens v. Gaylord*, 11 Mass. 256.

Passing over the question whether the promise of the defendant made a new cause of action, about which there seems to be little room for doubt, we come, second, to the main question which has been argued, viz., whether the executor in Rhode Island can sue at all for the amount due upon the note. The argument is that the note was payable in Killingly, the domicile of the defendant, and hence its proceeds were assets in Connecticut and not in Rhode Island. This argument is sustained by *Pinney v. McGregory*, 102 Mass. 186; *Abbott v. Coburn*, 28 Vt. 663; and *Wyman v. Halstead*, 109 U. S. 654. Admitting that the note was payable in Killingly, the fact does not control this case. If it were necessary to bring suit upon it in Connecticut of course an administrator would be appointed there. But it does not follow that it cannot be collected elsewhere. The plaintiff having the note, and finding property of the defendant in this State, had as much right to proceed to collect it here, as though it had been his own debt. It would be a most absurd rule of law which would require him to go to another State, record the will, secure the appointment of an administrator and go through all the requirements of a probate court in order to bring a suit where possibly there might be no property, when he could attach property here and secure his judgment without trouble. The cases cited by the defendant do not hold this. *Slocum v. Sanford*, 2 Conn. 533, appears to have been a case where the defendant, in 1813, had proved his claim against the estate of the payee, before insolvent commissioners in Rhode Island, from which the amount of the note sued upon had been deducted and the administrator in Rhode Island had given him a discharge from it before the suit was brought in Connecticut, but certainly before the trial in 1816, wherein this fact was held to be a good defence. Undoubtedly the *bona fide* settlement of a debt with a foreign administrator is a bar. In *Stevens v. Gaylord*, 11 Mass. 256, the defendant had been appointed administrator in Connecticut before an administrator had been appointed and suit brought in Massachusetts. It is indeed held in both these cases that the debt was assets in the State where the debtor resided, and this is the point to which they are cited. But that is not the question before us. Assuming this to be so, the question is whether the administrator may collect the debt in another State if he has the chance to do so. Upon this question we have no doubt. It is well settled that a *bona fide* voluntary payment to a foreign administrator is a good discharge of a

debt: *Mackay v. Saint Mary's Church*, 15 R. I. 121; and if this be so, an involuntary judgment, based upon an attachment of property, cannot be less valid. As said by Wells, J., in *Merrill v. New England Ins. Co.*, 103 Mass. 245, 248: "Having possession of, and a legal title to, the instrument, or evidence of the demand, and finding the debtor or his property within the jurisdiction of his appointment, he may enforce it there, without the necessity of any resort to the foreign jurisdiction. The debtor is equally responsible in either, if means of enforcing payment can be reached." The same doctrine was announced in *Perkins v. Stone*, 18 Conn. 270, 274, where debtors resident in Massachusetts were sued by an administrator in Connecticut. "Had it been necessary for the plaintiff to go into the State of Massachusetts to bring his action, it is conceded that he must have taken out letters there, to enable him to sue in his representative capacity. But as he is under no necessity of invoking the aid of the courts of that State, his case is not brought within the operation of the rule which precludes an administrator appointed in one State from suing in the courts of another." The case which comes most closely to opposing these cases is that of *Pond v. Makepeace*, 2 Met. 114. There, a Rhode Island administrator had brought suit in Massachusetts and obtained judgment by default, under which execution was levied on real estate, and it was sold in satisfaction of the judgment. It was held that the suit was no bar to a subsequent suit by a Massachusetts administrator, because the Rhode Island administrator had no power to sue in that State and so could pass no title to the real estate under the levy and sale. But that is not like this case. Here, the plaintiff is suing in Rhode Island, the State in which he holds his letters testamentary.

We see no reason why he may not so sue. The cases we have quoted from sustain the right and we know of none which deny it. The reason upon which the right is based is satisfactory and we therefore decide that the plaintiff has that right under the pleadings in this case.

The demurrers of the defendant in the plaintiff's replications are overruled.¹

¹ In spite of the doctrine that the existence of a promissory note given for a debt does not alter the situs of the debt, which is assets, for purpose of administration, at the domicile of the debtor, the courts appear to uphold a payment only to such administrator as can produce the note. Thus: 1. Payment to the administrator of the maker's State, without surrender of the note, is not a legal discharge as against the domiciliary administrator who has the note. *McCord v. Thompson*, 92 Ind. 565; *Amsden v. Danielson*, 19 R. I. 533, 35 Atl. 70 (affirming the decision above after withdrawal of the demurrer and rejoinder filed denying collusion); *St. John v. Hodges*, 9 Baxt. 334. See *Bull v. Fuller*, 78 Ia. 20, 42 N. W. 572, where payment to a domiciliary administrator without surrender of the note was upheld against the ancillary administrator with the note, on the ground that no creditor of the estate was interested, and "to compel a second payment, and require the debtor to seek repayment from the administrator in Vermont, when the money is already in the hands of a representative of the estate, merely in the interest of a double administration would indeed be a burlesque upon the administration of justice."

2. Payment to the domiciliary administrator who has not the note is not a legal

MERRILL v. NEW ENGLAND MUTUAL LIFE
INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[Reported 103 Massachusetts, 245.]

CONTRACT by the plaintiff as administrator of the estate of Howard M. Merrill, on a policy of insurance issued by the defendants upon the life of the intestate. The answer alleged that the defendants had been sued on the policy in Illinois by the administrator of Merrill appointed in that State. Merrill was domiciled in Illinois; the policy was pledged by him to the plaintiff as security for a loan which had not been paid. The defendant was a Massachusetts corporation.¹

WELLS, J. There can be no doubt that the appointment of the administrator in Massachusetts was legal and proper. A debt due to the intestate from any party having a domicile in this State, or any demand or right, requiring legal authority for its enforcement, is sufficient to give jurisdiction for such an appointment. Gen. Sts. c. 117, § 2; *Pinney v. McGregory*, 102 Mass. 186; *Picquet*, Appellant, 5 Pick. 65; *Emery v. Hildreth*, 2 Gray, 228. Such administration is auxiliary only, when the domicile of the intestate was elsewhere at the time of his decease, if there is an administrator at the place of domicile. It extends to all assets found within the State; and, within the jurisdiction where granted, it is exclusive of all other authority. The administrator appointed at the place of domicile of the deceased is the principal administrator; and personal securities, in the possession and control of the intestate at the time of his decease, vest in him. He can do no legal act for their collection in another jurisdiction, without an ancillary appointment there. And, if another has already been appointed auxiliary administrator, the collection can be made, within that jurisdiction, only through him. But the principal administrator may always dispose of or collect such securities, if he can do so without being obliged to resort to the domicile of the debtor. *Hutchins v. State Bank*, 12 Met. 421. Having possession of, and a legal title to, the instrument, or evidence of the demand, and finding the debtor or his property within

discharge as against the administrator of the maker's State who has the note. *Young v. O'Neal*, 3 Sneed, 55; and see *Riley v. Moseley*, 44 Miss. 37.

3. Payment to the domiciliary administrator who holds and surrenders the note is a good bar to a suit previously brought by the administrator of the maker's State who has not the note. *Thorman v. Broderick*, 52 La. Ann. 1298, 27 So. 735; *Goodlett v. Anderson*, 7 Lea, 286. See *McIlvoy v. Alsop*, 45 Miss. 365, where the administrator of the maker's State was allowed to foreclose a lien upon land in that State given to secure the payment of the note, though the note was in the hands of the foreign domiciliary administrator who refused to surrender it. — Ed.

¹ This short statement of facts is substituted for that of the Reporter. Arguments of counsel are omitted. — Ed.

the jurisdiction of his appointment, he may enforce it there, without the necessity of any resort to the foreign jurisdiction. The debtor is equally responsible in either, if means of enforcing payment can be reached.

The appointment by the insurance company of a general agent, with authority to accept, in behalf of the principal, service of legal process in Illinois, subjects the defendant to the suit brought by the principal administrator in the courts of that State. *Gillespie v. Commercial Insurance Co.*, 12 Gray, 201. As that suit was first brought, and apparently embraces the whole cause of action, so that a judgment therein would merge all liabilities of the defendant upon the policy, we should be inclined to hold that it was exclusive of any other remedy, so that no action could be prosecuted in any other court upon the same contract at the same time, if the administrator in Illinois had then had the legal title and possession of the policy, or the absolute right of possession. *Whipple v. Robbins*, 97 Mass. 107; *Newell v. Newton*, 10 Pick. 470; *Wallace v. McConnell*, 13 Pet. 136; *Embree v. Hanna*, 5 Johns. 101; *American Bank v. Rollins*, 99 Mass. 313.

It is said by Mr. Justice Dewey in *Colt v. Partridge*, 7 Met. 574, that "whether a plea in abatement that another action between the same parties, and for the same cause, is pending in another State, is good, has not been decided here." It is also said by Mr. Justice Foster in *American Bank v. Rollins*, that the doctrine of that case and of *Wallace v. McConnell*, *Embree v. Hanna*, and *Whipple v. Robbins*, "constitutes an important exception to the ordinary rule that *lis pendens* in a foreign court is not a good plea."

The present case does not depend upon the ordinary rule in regard to *lis pendens*; nor is it within the exception to that rule, if the decisions, above referred to, do constitute an exception. The administrator in Illinois and the administrator in Massachusetts are not the same party. They are not even in privity with each other. *Low v. Bartlett*, 8 Allen, 259; *Ela v. Edwards*, 13 Allen, 48. The authority and right of each is independent and exclusive within the jurisdiction of his own appointment. If, therefore, the policy had been in the legal custody and control of the principal administrator, the institution of proceedings for the collection of its proceeds by him, in the courts of Illinois, and jurisdiction of the defendant or its property obtained thereon, would have been such an appropriation of the claim as a part of the assets of the estate subject to administration there, as would have excluded the ancillary administration from any authority over it.

But, upon the facts stated, we are satisfied that the intestate had parted with the possession of the policy, upon a valuable and legal consideration, in his lifetime; so that, at his decease, he had no right of possession, and none passed to his administrator, except subject to such rights as had been conferred by the pledge and delivery of the policy by the intestate to his uncle Thomas T. Merrill. The agreed statement shows a distinct and unequivocal pledge of the policy to

secure the intestate's note for seven hundred dollars, given for money lent to him by Thomas T. Merrill upon the assurance and condition that it should be so secured. The policy was delivered in pursuance of that agreement, and remained in the possession of Thomas T. Merrill until he was appointed administrator. This was sufficient to constitute a good pledge of the instrument, giving to the pledgee an equitable interest in the proceeds of it. Angell on Insurance, §§ 327-340; *Palmer v. Merrill*, 6 Cush. 282; *Dunn v. Snell*, 15 Mass. 481; *Currier v. Howard*, 14 Gray, 511.

In that state of facts, if the principal administrator had himself received the ancillary appointment in Massachusetts, he could not have reclaimed the policy from the hands of Thomas T. Merrill without payment of the note in redemption of the pledge. It is unnecessary to consider now, whether, beyond this, the claim of the parents of the intestate would be protected against the general interests of the estate. It is sufficient that there was a right of possession in Thomas T. Merrill, superior to that of the intestate or his administrator, and which he might pass over to the administrator in Massachusetts upon such terms as he saw fit, consistent with his limited rights. His interest in the policy is not a mere order for a part of the proceeds, but extends to the whole policy alike. With his concurrence the auxiliary administrator may maintain a suit and collect the proceeds of the policy. Without it neither he nor the principal administrator could control the possession or collect the proceeds. The pledge makes it no longer a question of jurisdiction, as affected by priority of suit, comity between the States, or otherwise, but one merely of the right of the respective parties claiming an interest in the policy. The right of the plaintiff in this suit is superior to that of the principal administrator in Illinois, because he represents the equitable interest and right of immediate possession and control of the pledgee, as well as the legal capacity to sue, which remains in the representatives of the estate of Howard M. Merrill. That legal right to sue is held by the administrators of Howard M. Merrill, wherever appointed, in trust for the benefit of the equitable assignee of the claim. The assignee is entitled to control any suit brought for its recovery. His right would be protected by the courts against any attempt of the administrators to collect or release the demand in disregard of his interests. *Jones v. Witter*, 13 Mass. 304; *Eastman v. Wright*, 6 Pick. 316; *Grover v. Grover*, 24 Pick 261; *Rockwood v. Brown*, 1 Gray, 261; *Bates v. Kempton*, 7 Gray, 382. Upon the same principle, it would be equally protected against prejudice from any attempt to anticipate him by means of a suit instituted by such administrator in his own behalf and without recognition of the rights of the assignee. Within the same jurisdiction, the respective rights of the assignor and assignee may be readily adjusted, and suits controlled. The difficulty arises from the existence of suits in separate and independent jurisdictions. There is a class of decisions, referred to by the defendant, particularly affecting questions of jurisdiction between

the federal and State courts, to the effect that a subject-matter once brought within the jurisdiction of a court of general jurisdiction, whether by suit *in personam* or proceeding *in rem*, or even by process of attachment, is in the custody of that court, and cannot be withdrawn or controlled by any process or proceeding of any other court. But that doctrine is explained and narrowly limited by Mr. Justice Miller in *Buck v. Colbath*, 3 Wall. 334. It does not apply to this case, for reasons already indicated; because the policy, having been pledged and delivered to another in the lifetime of the intestate, was never in the legal possession of his administrator in Illinois, and therefore was never properly brought within the jurisdiction of the courts in that State, either as assets subject to administration, or as a cause of action which the administrator there could maintain. He could not, by commencing a suit there, transfer to those courts the determination of the rights of the pledgee, so as to compel him to seek them by intervening in such suit. The pledgee had an independent title, accompanied by possession of the policy; and by bill in equity in his own name, or by suit in the name of the administrator, in Massachusetts, could enforce his claim. Neither the administrator in Massachusetts nor the administrator in Illinois would be allowed to defeat the prosecution of such a suit. Against either administrator, seeking to collect the amount of the policy by other proceedings or means, the insurance company have a sufficient defence. That defence stands not merely upon the jurisdiction and judgment of the court, but equally well upon the title of the pledgee, yielded to by the insurance company without suit.¹ . . .

Upon the agreed statement, being satisfied that the plaintiff, as administrator of the intestate's estate in Massachusetts, and representing also the equitable interest and possessory right of the pledgee of the policy, is entitled to its control and collection, in preference to the principal administrator in Illinois, we feel bound to render judgment accordingly for the amount due from the defendant by the terms of the policy.

*Judgment for the plaintiff.*²

SULZ v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

COURT OF APPEALS, NEW YORK. 1895.

[Reported 145 *New York*, 563.]

PECKHAM, J. This is an appeal by the defendant from a judgment in favor of the plaintiff for the amount of a certain policy of insurance

¹ Part of the opinion, in which the effect of the assignment is discussed, is omitted.—ED.

² But see *Steele v. Conn., Gen. L. I. Co.*, 31 App. Div. 389, 52 N. Y. Supp. 373 (affirmed 160 N. Y. 703). A New York man whose life was insured in a Connecticut company pledged his policy to the company in Connecticut and died. His administrator in New York brought suit; then the company voluntarily paid the Connecticut administrator. This payment was held no bar to the New York suit.—ED.

for \$3,000 issued by the defendant, an insurance company organized under chapter 175 of the Laws of 1883. The policy of insurance, or certificate of membership, as it is sometimes called, was issued by the defendant association January 20, 1891, to Charles H. Sulz, payable to his "legal representatives," at the home office of the company, in the city of New York, within ninety days, after satisfactory evidence of the death of the insured party. The application for membership and for a policy of insurance in the corporation defendant was made by the insured, Charles H. Sulz, in December, 1890. In such application, in answer to the requirement to state the name of the beneficiary in full, he answered, "my estate." Mr. Sulz, at the time of the issuing of the policy to him (Jan. 20, 1891), was at San Francisco in California, and upon its receipt he sent it to his wife at their residence in the city of Brooklyn, to which city he soon returned, and it remained in the possession of the wife for about six months, when, on the removal of the family (the husband and wife) from one house to another in the city of Brooklyn, the wife packed it in a trunk, which was taken by the deceased when he started on his journey to Tacoma in the State of Washington. When the deceased went to Tacoma in 1891, he left his wife at his old home in the city of Brooklyn. In August, 1891, he wrote from the city of Tacoma to the home office of the defendant in the city of New York notifying them that he had made Tacoma, Washington, his home for the future, having gone into the manufacture of soaps and chemicals there, and he asked them to forward assessments to him at Tacoma, or to notify him who their agent was there, to whom he might make further payments. In January, 1892, Mr. Sulz died at Tacoma, having at the time this policy or certificate in his possession. At the time of his death his wife was still residing in Brooklyn. Letters of administration were applied for by his widow to the surrogate of Kings County and were granted, and she duly qualified and entered upon the discharge of her duties as administratrix. A few days after the granting of such letters, she signed a written renunciation of her right to take out letters as administratrix in Tacoma, and forwarded it to the former attorneys of her husband at that place, and thereupon one R. P. Thomas was appointed administrator of the estate of her husband by the proper court in the State of Washington. Mr. Thomas at once commenced an action in that State to recover upon the policy of insurance which he had taken possession of as part of the effects of the deceased, and such suit was commenced by the service of process upon an agent of the defendant residing in the State of Washington and duly authorized under the laws of that State, and by the designation of the defendant corporation to receive such service on its behalf. Within a few days subsequent to the commencement of that action, the plaintiff herein commenced this action, as administratrix of the estate of her deceased husband, in the Supreme Court of this State, to recover the amount due under such policy of insurance. The defendant set up a defence to this action based upon an alleged breach of

warranty by the insured in making false answers to certain questions contained in the application for insurance signed by him. It also set up the above facts in relation to the insurance policy and the pendency of the action against it in the Superior Court of the State of Washington, and claimed that the plaintiff herein had no right to maintain this action because of these facts. The case was tried at Circuit, and the facts relating to the alleged breach of warranty submitted to a jury, and upon the whole case the jury found a verdict for the plaintiff, and the question is whether the judgment entered upon that verdict shall stand.

We will assume that the letters of administration granted to the plaintiff by the surrogate of Kings County are conclusive in regard to the status of the plaintiff as being the administratrix duly appointed upon the estate of her deceased husband, and the only question remaining is whether as such administratrix, and upon the facts in this case, she can maintain this action. We are of the opinion that the courts of this State ought not to take jurisdiction of this action. The defendant issued what it terms in the blank application provided by it a "certificate of membership or policy of insurance," by which certificate or policy it insured the life of Mr. Sulz for \$3,000 for the benefit of his "legal representatives," those words being used in the instrument instead of the words "my estate," as used by the insured himself in his application for the insurance. The constitution and by-laws of the company, and the certificate or insurance policy itself, must all be looked at for the purpose of discovering what was the contract entered into by the parties. *In re Equitable Reserve, &c. Ass'n.*, 131 N. Y. 354-368. In some companies, possibly in this, a person might become a member thereof, and his family or any other named beneficiary be entitled to receive the benefit of such membership upon his death, as provided for in the constitution or by-laws, even where no certificates of membership or policy of insurance had been issued; but where such a paper has been issued by the company and delivered to and accepted by the insured person, it must be read in connection with such constitution and by-laws for the purpose of determining what the contract was which existed between the parties at the time of the death of the insured. The policy in this case was in the possession of the deceased at the time of his death in the State of Washington, and I do not think that it differs materially from any other policy of insurance so far as this question is concerned. Having been issued, it has become a material part of the contract between the parties to it.

The case of *Holyoke v. Union Mutual Life Ins. Co.*, 22 Hun, 75, is cited by the defendant, and is somewhat in point. In that case the plaintiff, as executrix of George E. Holyoke, brought an action in this State against the insurance company (a New York corporation) for the purpose of recovering the amount of a paid-up policy issued upon the life of one Alfred S. Perkins, a resident of the State of Maine, and by him assigned to Holyoke. The plaintiff's testator died in Brooklyn,

N. Y., May 7, 1875, where he had continuously resided for sixteen years prior to his death, and he left a will by which he bequeathed and devised his whole property to his wife, the plaintiff, which will was duly admitted to probate in Kings County, and on June 8, 1875, letters of administration were issued to the plaintiff. After the death of Mr. Holyoke, the assignment was found among his effects at his office in the city of New York and was delivered to the plaintiff, and had been in her possession up to the commencement of the action. On October 8, 1878, Alfred S. Perkins, the insured person, died, and the plaintiff immediately gave proper proofs of his death and otherwise duly performed all the conditions required of her by the policy and demanded its payment. The defence interposed was that the assignment in question was a collateral assignment only to secure Perkins's indebtedness to Holyoke, and that the amount due the latter had been paid, and that letters of administration, with the will annexed, upon the estate of Holyoke had been issued to one Percival Bonney by the Probate Court of Cumberland County, Maine, and that the policy of insurance was in the State of Maine at the time of Holyoke's death, and had been by Bonney assigned to and was then held and owned by another person residing in the State of Maine. The court held that at the time of the death of George Holyoke the legal title to the policy in controversy was vested in him; that he held a written assignment of the policy, and that in contemplation of law it was in his possession. The policy was, however, as matter of fact, in the State of Maine when the testator died, and was taken possession of by the administrator of his goods, etc., with the will annexed, who had been appointed by the Probate Court in the latter State. The court said it was immaterial whether the assignment to Holyoke by Perkins was as collateral security for the debt due from the latter to Holyoke or whether it was an absolute one. If collateral, the debt was due from Perkins himself; and he being a resident of Maine, no one could enforce payment of the debt in the courts of Maine, or release or control the same, save an administrator appointed in that State; and that if the assignment were absolute, the policy of insurance is the thing which formed a part of the property of the testator; that the assignment was only a muniment of title to that property, and must follow the thing assigned. It was stated that if the testator had left a chattel in Maine which remained in that State until after his death, it was clear that the chattel would belong to the administrator in Maine as against the administrator in New York, although the bill of sale transferring the chattel to the testator was found among his papers in New York, because administration of the property of the deceased person can be had only in the jurisdiction where the property is found after the death of such person, and the fact that the property in controversy is a chose in action makes no difference in the rule of law on this subject. Upon appeal to this court, the decision of the General Term was affirmed upon the opinion delivered by the court below (84 N. Y. 648). There are some expres-

sions in the opinion delivered in the Supreme Court in this Holyoke case which we might doubt the correctness of. While the decision itself upon the facts appearing in the report was proper, we do not think that the mere fact that a policy of insurance is found on the person of an individual dying in another State, but who was a resident of this State at the time of his death, would preclude the maintenance of an action by an administrator appointed here upon the policy in the courts of this State against a company residing here, although the policy remained in the other State. A simple contract debt (and such is a policy of insurance) is assets where the debtor resides, even though evidenced by a written instrument. *Wyman v. Halstead*, 109 U. S. 654; *Insurance Co. v. Woodworth*, 111 U. S. 138; *Chapman v. Fish*, 6 Hill, 554.

The case of *Morrison, Public Administrator, v. Mutual Life Ins. Co.*, 57 Hun, 97, is something like the Holyoke case, and it was held by the General Term, first department, that the administrator in New York could not enforce the payment of a policy of insurance issued by a company incorporated in this State to a resident of the State of Maine, where the policy had never thereafter been within the State of New York, even though the principal office of the company was in the city of New York. It was stated that the policy in question not having been in the State could not, under the principle of the Holyoke case, form any part of the assets of the deceased to which the plaintiff, an administrator appointed in the city of New York, acquired title. That case does not seem to have been brought to this court.

The facts in the case of *New England Life Insurance Co. v. Woodworth* (cited *supra*) are as follows: The husband of the insured commenced an action against the insurance company in the State of Illinois, although the party insured (his wife) died in the State of New York, and the insurance company was organized under the laws of the State of Massachusetts, and it was only after the death of the wife that the husband came into Illinois having the insurance policy in his possession. The United States Supreme Court held that a company may be regarded as present in and an inhabitant of the State where it has an agent upon whom, pursuant to the laws of that State, process may be served, and that an administrator is duly appointed in such State when the policy is brought within the State prior to such appointment, although the person insured died outside the limits of the State and not a citizen thereof. As the company is to be regarded as an inhabitant of the State where its agent is thus served with process, the court held that the principle that a simple contract debt followed the person of the debtor was not invaded, because the debtor was present in the State of Illinois when the suit was commenced by the husband as his wife's administrator, being at the same time the beneficiary under the policy. Under such facts the policy was assets in the State where it was when the administrator was appointed.

In this case the fact is the same; that is, the State of Washington

had enacted a law providing for the designation of an agent by a foreign company, upon whom process could be served for it, and the company had duly appointed such an agent, and process was properly served upon him in the action by the Washington administrator upon the insurance policy in question.

Within the above case in the federal court, the person of the debtor in this case was within the State of Washington, and the debt could be collected there as well as here. It is a case, therefore, of a concurrent jurisdiction, so far as the general facts go; and in such case the situs of the policy, the death of the insured in Washington, and the issuing of letters of administration in that State, and the prior commencement of the Washington action, are material facts. In this case we do not assert that the courts of this State might not have had jurisdiction to entertain this action, even though the policy were in the State of Washington, provided the courts of that State had not appointed an administrator, and the administrator thus appointed had not commenced an action on the policy prior to the action in this State. On the contrary, we are inclined to the opinion that jurisdiction of this action would in such event be entertained by the courts here. But in the case of administrators duly appointed in each State, when the foreign administrator first duly commences an action by the service of process upon an agent of the company to recover on the policy, and the policy is found in the foreign State at the death of the assured in that State, we think the courts of the foreign State have obtained jurisdiction, and therefore could give a full and complete discharge to the company if it paid upon a judgment obtained in such action, and we ought not to permit a second action in the courts of this State upon the same policy. In such a case as this we think that the principle of comity between the States calls for the refusal on the part of the courts of this State to entertain jurisdiction.

It is claimed, however, that the plaintiff might recover in this action under another aspect and in her own right, irrespective of her character of administratrix.¹ . . .

The judgment in this action ought not to stand, and it must therefore be reversed; and as the plaintiff cannot in any event succeed upon a new trial, her complaint should be dismissed, with costs out of the estate.

All concur, except O'BRIEN, J., not sitting.

*Judgment accordingly.*²

¹ The court held this contention unfounded. — ED.

² It is generally held that any administrator having possession of the policy may sue the company if he can get jurisdiction of it, and that any subsequent suit by another administrator is thereby barred. *New York Life Insurance Co. v. Smith*, 67 Fed. 694; *Equitable Life Ass. Soc. v. Vogel*, 76 Ala. 441; *Shields v. U. C. L. I. Co.*, 119 N. C. 380, 25 S. E. 951. *Contra*, *Ellis v. Ins. Co.*, 100 Tenn. 177, 43 S. W. 766. And see *Moise v. Life Assoc.*, 45 La. Ann. 736.

So, generally, any administrator may sue a debtor to the estate found within the

GOODALL v. MARSHALL.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1840.

[*Reported 11 New Hampshire, 88.*]

ASSUMPSIT, founded upon a promissory note, made by Alzo Rich, the defendant's intestate, payable to Jeremiah Jordan, or order, and indorsed.

Rich, the intestate, had his domicile in Vermont, and upon his decease administration was taken upon his estate in that government. Having left property in this State, an ancillary administration was taken here, and the defendant appointed administrator.

Prior to the decease of Rich the plaintiff had commenced an action against him in this State, founded upon this note, which was pending at the time of his decease.

The estate was represented insolvent in Vermont, and also in this State, and the plaintiff presented his claim, for allowance by the commissioners, in both States.

The commissioners in Vermont allowed the claim, and the administrators there excepted to the allowance, and filed their exceptions in writing in the Probate Court. Whereupon the plaintiff appealed to the County Court there, according to the law of that State, and the action there is still pending in that court.

The claim was also allowed by the commissioner in this State; and the defendant, having objected to the allowance, the plaintiff prosecuted his claim by entering this action in the common pleas, in pursuance of the statute.

The defendant moved the court to dismiss the action, alleging and offering to prove, that John Dewey, a citizen of Vermont, was the real owner of the note; and he contended that it could not be presented or prosecuted against the estate except in Vermont; and that if the plaintiff was the owner, the claim having been presented and prosecuted in Vermont, it could not be allowed in this State also.

The plaintiff denied that Dewey had any interest in the note, and contended that it was a valid claim against the estate, in this State and also in Vermont; and the questions arising upon the motion were reserved for the consideration of this court.

PARKER, C. J. The principal questions presented by this case have not been settled by any direct judicial decision here; and involving, as they oftentimes do, a conflict of laws, they have elicited some differences of opinion elsewhere.

When an individual dies possessed of estate in different governments, it seems to be settled, as a general rule, that his personal property; jurisdiction; and recovery will bar subsequent action in any jurisdiction. *Perkins v. Stone*, 18 Conn. 270; *Saunders v. Weston*, 74 Me. 85. See *Wyman v. Halstead*, 109 U. S. 654. — ED.

or movable estate, is to be distributed among his heirs or legatees according to the laws of the place in which he had his domicile at the time of his decease. 2 Kent's Com. 344, Lec. 37.

But the executor or administrator appointed in that place cannot, by virtue of that appointment, prosecute suits in any other State or foreign government, or claim to be recognized there as a representative of the deceased; nor can he be made answerable, as such, in any State other than that in which he has received letters of administration, or done acts which may subject him to liability as executor *de son tort*. *Sabin v. Gilman*, 1 N. H. Rep. 193; *Thompson v. Wilson*, 2 N. H. Rep. 291; *Morrill v. Dickey*, 1 Johns. Ch. Rep. 153, and cases cited; *Doolittle v. Lewis*, 7 Johns. Ch. Rep. 45; *Story's Conf. of Laws*, 422.

It becomes necessary, therefore, in order to the due collection and disposition of the personal property which may be left in any other government than that of the domicile, that an administration should be granted in pursuance of the laws of such government; and this is called an ancillary, or auxiliary administration.

That the proper office of such an administration is to collect the debts due the deceased in that jurisdiction, convert the personal property into money, and upon a settlement of the administration account, to transmit the balance found in the hands of the administrator, if so directed, to the place of the domicile, is generally admitted.

That the administrator has, generally, no power to dispose of the real property, unless the estate proves insolvent, is also clear. Under what circumstances he may obtain a license, and sell for the payment of debts, must depend upon the conclusions to be drawn respecting the relation which the ancillary administration bears to the principal administration, and respecting the rights of the creditors to demand payment of an ancillary administrator, or to have their claims allowed against the estate in his hands.

This is a subject of some practical difficulty. Whether the ancillary administration is to be made an instrument for the payment of the debts, or any part of them, and if the latter, of what part, has been a subject of considerable discussion.

If the general principle, that personal property follows the law of the place where the owner has his domicile, and is to be disposed of and distributed according to that law, was to be applied, without exception, in the administration and settlement of estates, it would seem to be the proper office of an ancillary administration to convert the property into money, and, after deducting the charges and expenses, to transmit all the residue to the place of the principal or original administration, to be distributed by the courts of that jurisdiction, according to its laws, leaving the creditors, heirs, and legatees to pursue their remedy in that forum. The law of the domicile could most readily and correctly be administered in its own tribunals, and the property, when converted into money, could easily be transmitted there.

But it has been thought that this course would impose an unnecc-

essary hardship upon creditors who were citizens of the government where the ancillary administration existed; and it seems to be generally settled that the debts due to such citizens should be paid by the ancillary administrator—the surplus only being transmitted to the place of the principal administration—and that in case of insolvency the assets in his hands are to be distributed among them. *Vide* 2 Kent's Com., Lec. 37; Story's Confl. 422; *Dawes v. Head*, 3 Pick. R. 145.

Some opinions exclude all other creditors from having their debts allowed and paid in the place of the ancillary administration. *Hunt v. Fay*, 7 Verm. R. 183, — Mr. Justice Mattocks *dissenting*. The point of the decision in that case, however, was, that the claim of the creditor was barred by a neglect to present it in this State, under the principal administration; which also was not the unanimous opinion of the court. And see *Davis v. Estey*, 8 Pick. 475.

It is apparent, that so far as creditors are permitted to prosecute their claims against the ancillary administrator, or the property in his hands, an exception must be made to the application of the law of the domicile of the late owner. If the debts are provided for in the place of the ancillary administration, the mode of payment under that administration must be regulated by the *lex loci rei sitæ*. In the case of immovable property, the claimant, or heir, whether he derives his title through an intestacy, or as devisee under a will, can take only according to that law. Story's Confl. 419. And in the case of insolvency, the creditors can reach the real property for the satisfaction of their debts only through the instrumentality of the same law.

With respect to movable property, as the title to it is subject to be modified, controlled, and limited by every nation, as it may think proper, with reference to its own institutions, and its own policy, and the rights of its own subjects, and as no nation is under any obligation of comity to enforce foreign laws prejudicial to its own rights, or those of its own subjects (Story's Confl. 421), it follows, that so far as an administration is had of the property in any particular government it must be according to the *lex loci*. This is uniformly, and it may be said necessarily, so in the granting of the administration, the collection of the debts due the estate, the conversion of the property into money, and the settlement of the account of administration. No nation or State is believed, in these particulars, to act with reference to the foreign law of the domicile of the deceased. Thus far the proceedings are analogous to laws regulating the remedy; or it may, perhaps, with more propriety be said that those proceedings, so far as they look to the payment of debts, are proceedings to enforce the remedy.

And the same law must govern the distribution of the assets in the payment of debts. If there be any conflict in the laws of the two places, the government which provides for and sustains the ancillary administration, if it retains the assets for distribution among those of its own citizens who are creditors of the estate, will of course provide

for their payment according to its own laws. There can be no reason, thus far, for the intervention, or administration, of any foreign law. Had those creditors pursued the property within their own government, in the lifetime of their debtor, it must have been according to the law of that government, excluding any preferences, or rules for distribution, prescribed by the *lex domicilii*; and the same application of the law may well continue after the decease.

Nor do we see any reason why a different rule of payment or distribution should be adopted, if the creditors of other States or nations are permitted to come with their claims, and to seek satisfaction out of the funds in the hands of the ancillary administrator. If the law of the domicile recognized and provided for preferences of one class of creditors over another; as, for instance, if by that law the creditors by specialty were first to be paid, while the *lex loci* required the payment of all creditors equally; the courts of the place of the ancillary administration could not be required, upon any principle of comity, to administer the foreign law, and to provide for such preferences, to the prejudice of their own citizens, claiming under their own laws. Nor could they be asked to administer the foreign law among their own citizens, by giving a preference of payment to those of them who were creditors by specialty. This conclusion seems to be sustained by the general current of authorities in this country. Story's Confl. 439, and cases cited.

The ancillary administration, therefore, operating only upon the property within that jurisdiction, is, throughout its whole proceedings, so far as creditors are concerned, to be governed by the law of the place. The property which is subjected to it, notwithstanding it is movable, no longer follows the law of the late domicile of its former possessor, except in regard to the balance which may be in the hands of the ancillary administrator, after the payment of the debts; and this will be subjected to the law of that domicile, either by being transmitted to the place of the domicile; or, if special circumstances require it, by a decree of distribution, according to that law, in the forum of the ancillary administration. It seems to be settled that this latter course is within the discretion of the court. *Harvey v. Richards*, 1 Mason's R. 408; 2 Kent's Com., Lec. 37; *Stevens v. Gaylord*, 11 Mass. R. 256; *Dawes v. Head*, 3 Pick. R. 144; *Heirs of Porter v. Heydock*, 6 Verm. R. 374; *Heydock's Appeal*, 7 N. H. Rep. 503. See also 8 Mass. R. 506, 9 Mass. R. 337.

This shows, very conclusively, that the position assumed in *Dawes v. Head*, 3 Pick. 141, that the ancillary administrator "is only the deputy, or agent, of the executor abroad," must be received with very great qualification at least. He receives his authority, not from the executor, but under a different law. He administers the estate which comes to his hands, up to the final settlement, under a different, and perhaps conflicting, law from that under which the executor acts; and he is in no way subject to the orders of the executor in the per-

formance of his duties. He may, it is true, be answerable to him through the operation of the administration bond, for the balance; and perhaps for mal-administration; and there may be a privity between them to a certain extent, but the consideration of that is not important at the present time.

As the movable property must be administered according to the *lex loci rei sitæ*, until it comes to the disposition of the balance in the hands of the administrator, is there any sound reason why a distinction should be made between creditors, citizens of that place, and those who reside in other governments? Or, in other words, shall the government which administers the property within its jurisdiction, and causes that administration to enure for the benefit of its own citizens, exclude the citizens of other States from a participation in it, by refusing to entertain their claims?

The first answer to this question may be drawn from a consideration of the state of the law relating to the remedies of the creditors, preceding the death of their debtor. It would perhaps be too much to say, that there is no nation, possessing just claims to be regarded as a civilized government, in which, during a time of peace and friendly relations, the subjects or citizens of a foreign State are excluded from pursuing similar remedies for the collection of debts to those provided for its own subjects. It is sufficient that no such exclusion is known to the common law, nor to the statutes of England or those of the several United States. So far as regards the relations of the latter to each other, any attempt at such exclusion is prohibited by the clause of the Constitution of the United States which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. If the creditors of the domicil may pursue the property of the debtor in his lifetime, in another government, equally with the citizens of the government where the property is situated, no sound reason suggests itself why they should be debarred of a remedy, and the property be appropriated exclusively, or in the first place, to the satisfaction of the creditors in the latter government, on his decease. Even if by permitting them to come in, the property may be insufficient to pay all, and the creditors in the government where the property is situated be thereby compelled to resort to the principal administration, where the debtor had his domicil, or to lose their debts, or a portion of them, this result is no other than might have been attained in the lifetime of the debtor, by his withdrawal of the property from their jurisdiction.

Another answer, and one which seems entitled to weight, is furnished by the considerations to which we have before averted, showing that the ancillary administration, so far as creditors are concerned, is to be governed by the *lex loci*. If no regard is had to the place of residence of the deceased, in the marshalling of the assets, and the payment of the debts, no good reason occurs to us why any regard should be had to the place of residence of the creditors, in the allowance of the claims.

And besides, it is not quite clear, in cases of actual insolvency, where there is sufficient personal property in the hands of the ancillary administrator to pay the debts due there, that the other creditors can reach the real estate, if any, in that place, except by presenting their claims there, and having them allowed, in due course, on a representation of insolvency. By the law of this State, lands are charged with the payment of debts, and an execution issuing against the goods and estate of a person deceased, in the hands of his executor or administrator, may be extended upon lands which were of the deceased. *Mead v. Harvey*, 2 N. H. Rep. 341. And the administrator may sell the lands, under a license, for the payment of debts, if they are necessary for that purpose, whether the estate be solvent or insolvent. N. H. Laws, 365. But if there is sufficient personal estate here to pay all the demands against the estate which may be prosecuted or allowed here, it may admit of question whether license can be granted, on a representation that the estate is insolvent under the administration of the place of the domicil. If the ancillary administrator has sold real estate, he may be required to pay over any balance of the proceeds remaining in his hands to the principal administrator or to account for such balance himself, in the settlement of his accounts in the place of the domicil, if he happen to be administrator there also. *Jennison v. Hapgood*, 6 Vermont R. 374, 7 N. H. Rep. 496; 10 Pick. R. 78; *Judge of Probate v. Heydock*, 8 N. H. Rep. 494.

And furthermore, the creditors, where the ancillary administration exists, are not bound to present or prove their claims in that place, but may rely upon their remedy in the place of the domicil alone, if they so elect.

For these reasons we are of opinion that where a person, domiciled in another government, dies, leaving property in this State, and an ancillary administration is taken here, and the estate represented insolvent, all the creditors of the deceased are entitled to prove their claims against the estate here, and to have it appropriated in satisfaction of their demands.

We are aware that the result, thus attained, will not place the rights of the creditors, in a state where an ancillary administration exists, precisely on the same footing on which they might have stood, with reference to the other creditors, had their debtor in his lifetime been declared a bankrupt in the place of his domicil. In that case the established law of the United States seems to be, that the creditors of the place, other than that of the domicil, may resort to the property there without regard to proceedings in bankruptcy; and that they may appropriate it, or so much of it as is necessary, to the payment of their debts. *Saunders v. Williams*, 5 N. H. Rep. 213, and cases cited.

The propriety of this American rule, as it has been called, authorizing the foreign creditors, in the case of bankruptcy, to appropriate the property to the payment of their debts, according to the *lex loci*, instead of

sending it to the place of the domicil, to be there distributed under the proceedings in bankruptcy, has been strongly impugned by Mr. Chancellor Kent and Mr. Justice Story, although they admit it to be the settled rule and policy here. If their views are correct, and if the disposition of the movable property situate in a foreign government, on the decease of the owner, ought to be founded on similar principles, then the result would seem to be that no debts should be paid through the agency of the ancillary administration; but that all the proceeds, after deducting the expenses of the administration itself, should be transmitted to the place of the principal administration, and all the creditors be compelled to resort thither for their satisfaction. But a universal consent to this, as the rule, is not to be expected; the authorities having already settled, that the creditors, where the property exists, shall not be compelled to resort to the place of the principal administration.

It is true that the rule just adverted to, allowing the creditors of the place where the property is situated to appropriate it, so far as is necessary, to the payment of their debts, in cases of bankruptcy, might be applied, through the agency of an ancillary administration, to the satisfaction of the same class of creditors, and to the exclusion of others, after the decease of their debtor. But although it is very desirable that rules regulating the rights of creditors should be simple and uniform, so far as may be, and that analogous cases should be governed by rules having as great an analogy to each other as the cases they govern have to one another, still we think there are sound reasons why this rule, which thus prevails in bankruptcy, should not be applied to the settlement of estates, even if the estates be in fact insolvent. In the first place the rule itself, which, in bankruptcy, permits the creditors in a foreign government to seize upon the property there (although it has much of policy to justify it, in the protection it gives to the citizens of the government in which the property is found, and from which it must be carried in order to be distributed under the bankruptcy), would not commend itself to an enlightened jurisprudence, which could protect and provide for the interests of all the creditors. There are several reasons why this rule may be justified, as one of policy, in the existing state of things. The property so situated would have been liable to the satisfaction of creditors there, through the agency of their own tribunals, in the lifetime of their debtor — the tribunals of the country where it is situated cannot administer the law under which the debtor is declared bankrupt or insolvent; nor is provision usually, if ever, made for auxiliary proceedings in insolvency — the creditors, in the government of the domicil, may well be bound by the law which their own legislature, or lawgiver, has provided for them; and not be permitted to resort to foreign tribunals, to obtain preferences in cases where their own laws have declared that the proceedings of their debtor ought to be arrested, and his property divided among his creditors. It is only by these,

and other reasons of a similar character, that the rule in cases of bankruptcy can be made entirely satisfactory, if even these can make it so.

But some of these reasons have little if any application in cases where the debtor is dead, and where the laws of the several States in which his property is situated provide for the collection of the assets by an administration, and also for the payment of the debts. Especially, it cannot be said, in such cases, that the creditors of the place of the domicile ought to be bound to the action of their own tribunals, and not permitted to go abroad and avail themselves of another administration for the purpose of obtaining satisfaction.

The next question is, whether the fact that the plaintiff has presented his claim in Vermont, and that proceedings are now pending there for its allowance against the estate, under the principal administration, can avail to defeat the claim here.

The mere pendency of a suit in that State would have been no bar to an action brought here, against the intestate, in his lifetime. *Brown v. Joy*, 9 Johns. R. 221; *Weeks v. Pearson*, 5 N. H. Rep. 325. And there is as little reason why the mere pendency of proceedings against his estate, in another State, should form a bar to the allowance of his claim against the estate in this jurisdiction.

But we do not place our decision upon this ground alone. The considerations already suggested indicate our opinion, that where an estate is represented insolvent, all the creditors may pursue their claims, and have them allowed, in every government where administration is taken, for the purpose of availing themselves of all the estate of their debtor, until they have obtained payment of their debts.

In the view we have thus taken of the matter, it is wholly immaterial whether the plaintiff is the absolute owner of the demand, or whether he holds it in trust for Dewey, as alleged by the administrator.

A final adjudication upon the mode and manner of distributing the assets, where there is more than one administration, and an actual insolvency, is not necessarily involved in this case, except that it follows as a consequence from the principles stated, that there is to be a distribution among the creditors who prove their claims, under the ancillary administration. That the court there cannot distribute directly to any creditors except those who present their claims, in due course, for settlement, is very clear. Whether, in making this distribution, regard is to be had to any other claims, seems not to be fully settled. In *Dawes v. Head*, before referred to, an opinion is expressed that the proper course is to make a *pro rata* distribution among the creditors, citizens of that State, having regard to all the assets in the hands of the principal, as well as in those of the ancillary administrator; and having regard also to the whole debts, which by the laws of either country are payable out of those assets, "disregarding any fanciful preferences which may be given to one species of debt over another," &c. It is further said, "the administrator here should be held to show the con-

dition of the estate abroad, the amount of property subject to debts, and the amount of debts, and a distribution could be made upon perfectly fair and equitable principles." In *Davis v. Estey*, 8 Pick. R. 475, the principle was directed to be applied, in the satisfaction of a judgment rendered.

Cases may exist in which this will prove a perfectly satisfactory rule, and accomplish an equal distribution, among all legally entitled. But in other cases there may be great difficulty in its application. It holds the ancillary administrator to furnish evidence which he may have no means of procuring, for he has no control over the principal administrator. It may not accomplish the equality which is the great object to be attained by it; for if the estate in the hands of the principal administrator is greater in proportion to the claims there to be paid, than that in the hands of the ancillary administrator in proportion to the claims allowed under that administration, no decree can be made under the latter which will give the creditors there a *pro rata* distribution, unless their claims have been allowed under the principal administration also. It is only when the funds collected under the ancillary administration will give the creditors in that government as great a share as the others that the equality sought is to be attained by that process. Another objection is, that if, by the laws of other governments, there are "fanciful preferences" existing there, the rule cannot be made reciprocal in its operation; for in a case in which the ancillary administration exists there, and the principal one in a State where by the laws there is to be an equal distribution, the courts in which the ancillary administration proceeds must give effect to the preferences there allowed, whether they are regarded as fanciful or otherwise; and in that case the surplus of the assets, over and above the rateable share of the creditors there, will not be transmitted to the place of the principal administration, that the creditors there may have an equal share. Besides, if there is anything here which should be distributed with reference to the laws of another government, or with reference to the property which is to be disposed of by the operation of those laws, we can hardly regard the preferences they give as fanciful, or disregard the laws themselves, while we take into account the property on which they are to act.

It will deserve further consideration, when a case arises which shall require it, whether it is not the better rule to distribute the assets, under the ancillary administration, among all those who have entitled themselves to payment, or a dividend, there, without reference to the amount of the estate, or claims elsewhere. So long as it is open for all to present and prove their claims, this rule will provide for as equal a distribution as the laws permit. If creditors fail of obtaining a full share, through their own laches, they will have no cause of complaint.

It may be, that upon the final distribution in the place of the domicile, among the creditors who have pursued their claims there, such regard should be had to the dividends, or payments, which have been received

in the place of the ancillary administration, as to distribute the assets, as far as possible, among those entitled according to the law of the domicile. Regard is, of course, to be had to such payments far enough to provide that no creditor shall receive more than his whole demand, by means of having had it allowed in different jurisdictions. But we may well dismiss the further discussion of this matter at the present time.

*Motion denied.*¹

PARDO v. BINGHAM.

ROLLS COURT. 1868.

[*Reported Law Reports, 6 Equity Cases, 485.*]

THIS was a creditors' suit for the administration of the estate of Augustus Frederic Hamilton, and now came on to be heard on further consideration.

Mr. Hamilton was an Englishman by birth, but was at the time of his death, and had been for many years previously, resident in Venezuela. It did not appear, however, that he had acquired a domicile in that country.

In 1846 Hamilton executed, in Venezuela, an instrument in the Spanish language for the purpose of securing to one Level de Goda the payment of a sum of £1,600. This instrument was registered in Venezuela in accordance with the forms prescribed by the law of that country; and by virtue of such registration, De Goda became entitled, according to that law, to be paid the sum so secured out of Hamilton's general assets in priority to all the other creditors.

The only fund available to the creditors consisted of two sums of bank annuities, over which Hamilton had a general power of appointment by will, which he had exercised.

The question was now raised whether the court, in distributing this fund, would give effect to the priority acquired by De Goda over the other creditors of the testator.²

¹ It is generally held that a foreign creditor may prove his claim with an ancillary administrator, and if payment is refused sue him to recover the amount of the claim. *Miner v. Austin*, 45 Ia. 221; *De Sobry v. De Laistre*, 2 H & J. 193; *Washburn's Estate*, 45 Minn. 242, 47 N. W. 790; *Carroll v. McPike*, 53 Miss. 569; *Hopper v. Hopper*, 125 N. Y. 400, 26 N. E. 457; *In re Adlum's Estate*, 22 Pa. 514 (*semble*). *Contra*, *Shegogg v. Perkins*, 34 Ark. 117; *Hunt v. Fay*, 7 Vt. 170 (altered by statute, *Prentiss v. Van Ness*, 31 Vt. 95).

In *Davis v. Esty*, 8 Pick. 475, it was held that a domestic creditor would be allowed no greater proportion of his claim out of the domestic estate than the whole body of creditors would obtain from the estate at large. In *Hays v. Cecil*, 16 Lea, 160, a foreign creditor who had already received as large a proportion of his claim as would be allowed from the domestic estate was not permitted to prove. — ED.

² Arguments of counsel are omitted. — ED.

LORD ROMILLY, M. R. Unless both the debtor and the creditor were domiciled in Venezuela, I think that the registration of this document can only affect assets in Venezuela over which that country has power.

I do not think that I can properly direct an inquiry as to the domicile, unless a strong case is made out for the purpose. It was the duty of Mr. Hemming's client to make out his case; and he ought not to come here upon one ground, and when that fails, try to succeed upon another. If any inquiry, therefore, is to be directed, it must be upon a special application made to me. That being so, I am of opinion that a debt contracted with a foreigner by an Englishman living abroad does not entitle the foreigner, by reason of any particular law of his country, to claim priority in payment of his debt out of a fund which, by the law of this country, is equitable assets for the benefit of all the creditors of the debtor. The fund must be distributed according to the law of this country; and I will make an order accordingly.¹

ANONYMOUS.

CHANCERY. 1722.

[*Reported 9 Modern*, 66.]

THE testator, who lived in Holland, and who was seized of a real estate there, and of a considerable personal estate in England, devised all his real estate to the plaintiff, and all his personal estate to the defendant, whom he made executor, and died. But at the time of his death he owed some debts by specialties and some by simple contract in Holland, and had no assets there to satisfy those debts, other than by his real estate, which, by the custom and laws of Holland, is made liable to the payment of debts upon simple contract as well as upon specialties if there are not personal assets to answer the same, especially debts upon simple contract for servants' wages or for work done.

Now the creditors in Holland sued the plaintiff there, to whom the real estate was devised, and had a sentence against it by virtue whereof it was sold for the payment of their respective debts.

Thereupon the plaintiff exhibited this bill against the defendant, who was executor, and to whom the personal estate was devised as

¹ *Acc.* *In re Kloebe*, 28 Ch. D. 175; *Smith v. Bank*, 5 Pet. 518. *Wilson v. Dun-sany*, 18 Beav. 293, *contra*, is overruled.

In *Miller's Estate*, 3 Rawle, 312, the opinion was expressed that as to assets transmitted from another country for administration, creditors from that country who were forced to follow the assets might be entitled to priority according to their law. *Acc.* *Hanson v. Walker*, 7 L. J. Ch. (o. s.) 135.

The allowance of expenses is also regulated by the law of the forum. *In re Adlum's Estate*, 22 Pa. 514. — Ed.

aforesaid, that he (the plaintiff) might be reimbursed by the defendant for the loss he had sustained in not bringing the personal estate to Holland to discharge the debts there in aid of the real estate.¹

THE COURT [LORD MACCLESFIELD, L. C.]. By the laws of Holland all debts shall affect the real estate there; but it is there, as it is here, that the personal estate shall come in aid of the real estate, and be charged in the first place; therefore the personal estate in this case should answer the loss the plaintiff sustained by the sale of the real estate, though that happened in a different dominion.

Therefore it was decreed that the plaintiff should be reimbursed.²

YOUNG v. WITTENMYRE.

SUPREME COURT OF ILLINOIS. 1888.

[*Reported 123 Illinois, 303.*]

CRAIG, J. This is an appeal from a decree of the Probate Court of Cook County, which ordered the sale of certain real estate to pay the debts of the estate of William Wittenmyre, deceased.

William Wittenmyre was a resident of Cook County, and died intestate, in Cook County, January 4, 1879, leaving a widow, Susan C. Wittenmyre, appellee here, and two children by a former wife, Sallie A. Young and Charles A. Wittenmyre, his only heirs-at-law. On the 14th day of January, 1879, the widow, on her petition, was appointed administratrix of the estate by the Probate Court of Cook County. Wittenmyre, prior to his death, had been engaged in business in Appanoose County, Iowa, and at the time of his death was possessed of a large amount of personal property in that county, consisting mainly of a stock of goods in a general store. In the month of February, 1879, the widow was appointed by the Circuit Court of Appanoose County, Iowa, administratrix, to administer upon the assets in that State. This appointment was made under a section of the statute of Iowa, which reads as follows: "If the administration of the estate of a deceased non-resident has been granted in accordance with the laws of the State or country where he resided at the time of his death, the person to whom it has been committed may, upon his application, and upon qualifying himself in the same manner as is required of other executors, be appointed to administer upon the property of the deceased in this State, unless another has been previously appointed." McClain's Stat. 1882, § 2368, p. 642.

On the 1st day of July, 1879, the administratrix filed, in the Probate

¹ Part of the case, involving another point, is omitted. — Ed.

² See *Hanson v. Walker*, 7 L. J. Ch. (o. s.) 135; *Harrison v. Harrison*, L. R. 8 Ch 342; *Rice v. Harbeson*, 63 N. Y. 493; 16 Clunet, 308 (Colmar, 2 Mar. '87). — Ed.

Court of Cook County, an inventory, in which she inventoried the lands described in the petition. The inventory then stated "that no other property had come to the possession or knowledge of the administratrix." On the same date the appraisers made a return to the court that no property belonging to the estate, subject to appraisal, had come to their sight or knowledge. They also reported that they had estimated the widow's award at \$2,080. The allowance seems to have been approved by the court. No report of the assets in Iowa was ever made to the Probate Court in Cook County, and, so far as appears, after the filing of the inventory and appraisal bill containing the widow's allowance, as heretofore stated, no further steps were taken in the Probate Court of Cook County in the settlement of the estate, until this petition to sell real estate was filed. The administratrix, however, proceeded to settle up the estate in Iowa. August 15, 1879, she filed a report, which was approved on December 8 following. January 27, 1880, she filed another report, in which she showed that she had distributed \$2,850 of the personal estate in Iowa, — \$950 to herself, as widow, and \$950 to Sallie A. Young, and \$950 to Charles A. Wittenmyre, as heirs. This report was approved. On the 25th day of January, 1881, the administratrix made a final report, and was discharged. On the 11th day of March, 1881, this petition was filed to sell real estate in Cook County to pay the widow's award, and a claim of \$75 which had been allowed, and also the costs of administration, estimated at \$250. On the hearing, it turned out that the claim of \$75 had been paid from the assets in Iowa, and the administratrix had been allowed a credit for the amount. The widow's award was reduced to \$1,500, and the court found the deficiency of personal estate to be \$1,030, and decreed a sale of real estate to pay such deficiency.

It is not claimed that there are any debts against the estate remaining unpaid, except the widow's allowance, and it is also an undisputed fact that the administratrix had in her hands an amount arising from the assets in Iowa, after the payment of all debts in that State, much larger than her specific allowance, which she of her own accord distributed between herself, as widow, and the two heirs. Under such circumstances, has she the right to obtain a decree to sell real estate to pay her specific allowance? In this State, the personal property is the primary fund for the payment of all debts against an estate, and under the terms of section 97 of chapter 3 of the Revised Statutes of 1874, it must appear that the personal estate of a decedent is insufficient to pay the debts before the real estate can be sold for that purpose. Here, if the personal assets in Iowa are to be taken into consideration, personal property which passed into the hands of the administratrix was ample to fully pay all just claims against the estate, and no satisfactory reason was shown, on the trial in the Probate Court, why the personal assets were not appropriated to the payment of debts until the debts were satisfied, — before a distribution was made between the heirs. As Cook County, in this State, was the residence of Wil-

liam Wittenmyre at the time of his death, the administration granted here was the principal administration, and the letters granted in Iowa were but an ancillary administration. *Stevens v. Gaylord*, 11 Mass. 262. It was no doubt the duty of the administratrix in Iowa to collect all debts due the estate there, and convert all assets within that jurisdiction into money, and from the money pay all debts established against the estate in that jurisdiction; but after the debts in Iowa had all been paid, and a large balance was left in the hands of the administratrix, she had no right whatever to distribute such balance among the heirs in Iowa, but, on the other hand, it was her duty to bring the balance into this State, in order that it might be disposed of under the authority of the court within whose jurisdiction the deceased had his domicil. The balance, whatever it was, should have been returned to the principal administration.¹ . . .

But it is said that the heirs (appellants here) "were parties to the accounting in Iowa, and having accepted their distributive shares there, cannot now be heard to say that this was all wrong." There is some force in the position of appellee on this question, and if the heirs had been instrumental in requiring appellee to make distribution in Iowa, knowing that there remained a debt here unpaid, it may be that they might be estopped from insisting upon the defence here interposed, in opposition to a sale of property to pay the debt. But such was not the case. They did not require appellee to make a distribution of the assets in Iowa. Her action there was of her own free will. Nor does it appear that appellants knew that appellee held a claim in this State unpaid. On the other hand, appellee, knowing that she held a claim in this State, without being required to make a distribution in Iowa by the heirs or the court, voluntarily paid over money to the heirs which she ought to have retained, in payment of debts. Having done this, she is the one in the wrong, and she having had in her hands sufficient personal assets to pay all claims against the estate, both in Iowa and here, and having paid out such assets wrongfully, she cannot now obtain a decree to sell real property to pay debts which might and ought to have been paid from the personal assets.

The judgment of the Probate Court will be reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

COWDEN v. JACOBSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1896.

[Reported 165 Massachusetts, 240.]

MORTON, J. This is an appeal by an administrator from a decree of the Probate Court in Worcester County disallowing certain items in his

¹ The court here cited and discussed the cases of *Jennison v. Hapgood*, 10 Pick. 77, and *Fay v. Haven*, 3 Met. 109. — ED.

account. At the hearing before the Chief Justice, the appellee desired to contest other items in the account besides those involved in the appeal of the administrator, but the court ruled that it was not open to her to contest other independent items. The appellee does not question now the correctness of the ruling, and we think that it clearly was right. *Boynton v. Dyer*, 18 Pick. 1; *Harris v. Harris*, 153 Mass. 439.

The principal matter in dispute relates to the disallowance of the payment by the administrator of a note held against the intestate at her decease by Walter B. Chase of Sutton in this State, an heir at law. The intestate lived in Connecticut, where she possessed real and personal estate. She also possessed real estate in Sutton. The appellant, who lives in Worcester, was appointed administrator in both States. The next of kin were Walter B. Chase aforesaid, a brother, and one Hattie H. Jacobson of Portland, Maine, a half sister. By the laws of Connecticut kindred of the whole blood take to the exclusion of the half blood. There were debts of the intestate in this State, consisting of the note to Chase, and of unpaid taxes on the estate in Sutton. During the settlement of the estate in Connecticut the note was presented by Chase to the judge of probate, as it is provided by the Connecticut statutes may be done with claims when the administrator lives out of the State (Gen. Sts. of Conn. of 1888, § 582), and he, on learning that there was estate of the deceased in this Commonwealth, declined to allow it on the same grounds as debts due Connecticut creditors, and the note was not allowed, and does not seem to have been presented again to that court. Subsequently the administrator in Connecticut, having settled his account with the estate in the Probate Court there, and having in his hands for distribution, as appeared from said account, \$1,425.13 in personal estate, was ordered by the Probate Court under the statute for such cases made and provided (Gen. Sts. of Conn. of 1888, § 628) to pay the same to said Chase as the heir-at-law, and did so. The estate in Sutton was sold by the administrator pursuant to license from the Probate Court, and the note was paid out of the proceeds. The appellee, who was a minor, had notice of the petition to sell the real estate in Sutton, and also of the action of the court in Connecticut in regard to distribution, but made no objection to the proceedings until the administrator presented his account for allowance to the Probate Court of Worcester County.

The appellee contends that the note should have been paid by the administrator out of the personal estate in Connecticut, and she relies on *Livermore v. Haven*, 23 Pick. 116, and also on *Fay v. Haven*, 3 Met. 109, where another question growing out of the same controversy was considered. But in *Livermore v. Haven*, as was observed in substance in *Prescott v. Durfee*, 131 Mass. 477, the question was whether the court in its discretion should grant a license under the circumstances to sell real estate in this Commonwealth for the payment of debts. In this case the license has been granted by a court of com-

petent jurisdiction, after due notice, and the sale has been made, and neither those proceedings nor the validity of the appointment of the administrator can now be attacked collaterally by the appellee. *Pierce v. Prescott*, 128 Mass. 140. It does not appear that the payment by the administrator was not made in good faith, or that there was any collusion between him and Chase in regard to the settlement of the estate in Connecticut, or the sale here.

If there were collusion or bad faith the case might stand differently. *Stevens v. Gaylord*, 11 Mass. 256, 266. The distribution of the estate in Connecticut was made under an order of the Probate Court, which has not been impeached in any respect. The administrator was bound to comply with it, and for aught that appears would have been liable to a suit on his bond if he had failed to do so. Though administrator of both estates, he could not have been compelled to apply the personal property in Connecticut to the payment of debts here, nor have been held accountable for it here. *Boston v. Boylston*, 2 Mass. 384; *Hooker v. Olmstead*, 6 Pick. 481; *Fay v. Haven*, 3 Met. 109, 114; *Wheelock v. Pierce*, 6 Cush. 288; *Norton v. Palmer*, 7 Cush. 523. If it was necessary, in order to justify the payment of the note out of the proceeds of the real estate sold here, for the administrator to show that the creditor had used some diligence to collect the note out of the personal estate in Connecticut, and that he had met with some legal impediment there, we think it sufficiently appears that he had done so. He presented his claim to the proper tribunal, which declined to allow it except subject to the priorities of Connecticut creditors. It certainly would be going very far to hold that, under such circumstances, he was bound to wait upon and follow the settlement of the Connecticut estate, instead of resorting to the real estate here.

In *Prescott v. Durfee*, *ubi supra*, it was held that a Massachusetts creditor of a New York intestate, who died possessed of real estate here but no personal estate, might procure the appointment of an administrator in this State, and attach the real estate to recover the payment of his demand. It appeared that an administrator had been appointed in New York, and that there was personal estate there more than sufficient to pay all the debts, and there was nothing to show that the creditor had made any effort to collect his debt out of the personal estate in New York. But neither fact appears to have been regarded as material.¹

If there had been different administrators in Connecticut and Massachusetts, and the same course had been pursued by them in regard to the respective estates that has been followed by the present administrator, we presume that it hardly would be contended that the payment of Chase's note by the administrator in this State should be disallowed. We do not see that it makes any difference on principle that the same person was administrator in both jurisdictions. As already ob-

¹ *Acc. Rosenthal v. Renick*, 44 Ill. 202; and see *Hobson v. Payne*, 45 Ill. 158; *In re Gable's Estate*, 79 Ia. 178, 44 N. W. 352. — Ed.

served, he is not accountable here by reason of that fact for the estate in Connecticut. See *State v. Osborn*, 71 Mo. 86. If he has not administered the estate in Connecticut according to law, doubtless he is liable there upon his bond. This court cannot revise his actions as administrator of that estate. *Jennison v. Hapgood*, 10 Pick. 77, 101. If he has administered it according to law, still less can his conduct be made the foundation of liability by reason of the payment of Chase's note out of the proceeds of the real estate in Sutton. The appellee's contention would seem to go the length of requiring him to maintain that, although the administrator administered the estate in Connecticut in good faith, and distributed it according to the direction of the court having jurisdiction of it, the payment of Chase's note should be disallowed because the administrator did not see that it was paid out of the personal estate in Connecticut. If that be so, then, without adverting to other considerations, the converse of the proposition must be equally true; namely, that the creditor was bound to obtain payment out of the personal estate in Connecticut, and had no right to resort to the real estate here, which would be at variance with *Prescott v. Durfee*, *ubi supra*. We do not think that either proposition can be maintained when applied to the circumstances of this case. It is not contended that it was the duty of the administrator in Connecticut to see that creditors presented their claims and were paid out of the personal estate there, and we assume that he committed no breach of his bond by failing to do so, or to appeal from the ruling of the Probate Court disallowing the note. In the absence of personalty in this State, the real estate constituted a fund for the payment of debts here. The administrator was not bound to see that either estate was exonerated at the expense of the other. He was required to administer and dispose of each estate in good faith according to the law of the State where it was situated. In respect to this item there is nothing to show that he has not done so. We think that the payment to Chase should have been allowed.

The two remaining items relate to the burial of the deceased whose remains were brought into this Commonwealth and consist of the undertaker's services and the cost of digging the grave. They were incurred before but not paid till after the settlement of the account in Connecticut, and were not included in it. No doubt, if there had been but one administrator, and he in Connecticut, these items would have been allowed in his account if duly presented to and paid by him. *Jennison v. Hapgood*, 10 Pick. 77, 86, 87. But though the administration here was ancillary to that in Connecticut, we think that these expenses must be regarded as incurred by the ancillary administrator in the due course of his administration of the estate in this Commonwealth, and that as such they should be paid out of the property available here for the payment of demands due to creditors residing in that State.

A majority of the court think that the decree of the Probate Court should be reversed in respect to the items appealed from, and affirmed in other particulars, and it is

So ordered.

SMITH v. HOWARD.

SUPREME JUDICIAL COURT OF MAINE. 1894.

[*Reported 86 Maine, 203.*]

WHITEHOUSE, J. This is an appeal from the decree of a judge of probate, allowing the account filed by the defendant, as administratrix on the estate of her husband, whose domicile was in Massachusetts at the time of his death. The appellants are the children and heirs of the decedent, and the only item in the account to which they object is a credit of \$700, being the amount granted to the widow as her allowance, by the judge of probate in this State. The defendant took out the ancillary administration in this State in May, 1892, on personal property amounting to \$850. In June of the same year, she took out the principal administration in the place of the domicile of the decedent; but the entire estate in that jurisdiction, small in amount, was exhausted in effecting a settlement by compromise with the creditors in that State. No allowance was made to the widow, or applied for by her, in Massachusetts. The allowance in question was made by the judge of probate in this State in July, 1892.

The only question presented by the agreed statement, accompanying the appeal, is whether the judge of probate in this State had jurisdiction and authority to decree this allowance to the widow of a non-resident decedent from assets in this jurisdiction on which there is ancillary administration.

In determining this question, a new one in this State, it is proper to be reminded that courts of probate are tribunals of special and limited jurisdiction only. They are wholly creatures of the legislature. They exercise only such powers as are directly conferred upon them by legislative enactment, and such as may be incidentally necessary to the execution of these powers. Unless authority for the exercise of jurisdiction in a given case can be found in the statutes, given either expressly or by implication, the proceeding is void. Woerner's Am. Law of Ad., § 142; Fowle v. Coe, 63 Maine, 248.

It is furthermore important to observe that, in order to discover the true scope and purpose of statutes defining the powers of these courts, they are to be examined in the light of the common law, which it may be supposed they were intended to modify, affirm, or supersede, or by which their practical operation might be affected. In this case it is proper to consider that the statutes of every State are enacted primarily with reference to the citizens within its own jurisdiction; that it is the right of a State to pass laws for the appropriation of any property of a decedent within its limits to the payment of the just claims of creditors residing there, even if not in entire harmony with the spirit of comity between States; and that letters of administration have no legal force or effect beyond the territorial limits of the State in which they are

granted. *Saunders v. Weston*, 74 Maine, 92 ; *Smith v. Guild*, 34 Maine, 443 ; *Story, Conf. of Laws*, § 512. These statutes are also to be construed with due regard to the universal rule which Chancellor Kent declares to be as "settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to, and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicil at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated." 2 *Kent's Com.* 571 ; *Gilman v. Gilman*, 53 Maine, 184 ; *Wharton on Conf. of Laws*, §§ 604, 627. The principle last stated, as will presently be seen, is expressly recognized and affirmed in our statutes. (R. S. c. 65, § 36.)

In the subdivision of chap. 65, R. S., entitled, "Allowances to widows and others," is the following in section 21 : "In the settlement of any intestate estate, or of any testate estate, which is insolvent, or in which no provision is made for the widow in the will of her husband, or when she duly waives the provisions made, the judge may allow the widow so much of the personal estate beside her ornaments and wearing apparel as he deems necessary, according to the degree and estate of her husband, and the state of the family under her care." The last subdivision of this chapter is entitled, "Distribution of the estates of deceased non-residents." In the first section of it (§ 36) is the following : "When administration is taken in this State on the estate of any person who at the time of his death was not an inhabitant thereof, his estate found here, after payment of his debts, shall be disposed of according to his last will . . . if he left any ; but if not . . . his personal estate shall be distributed according to the laws of the State or county of which he was an inhabitant ; and the judge of probate, as he thinks best, may distribute the residue of said personal estate as aforesaid, or transmit it to the foreign executor or administrator, if any, to be distributed according to the law of the place where the deceased had his domicil." These are modified forms of the original enactments of 1821 (§§ 8, & 39, c. 51), which were adopted from Massachusetts. In that State the corresponding statutes were enacted at different periods, that relating to ancillary administration, in the form as adopted, having been enacted in Massachusetts, in 1818. None of the enactments providing for administration on the estates of deceased non-residents in Maine or Massachusetts at any time contained any express reference to a widow's allowance.

It is manifest from the history of these two sections in our Revised Statutes above quoted, and their present collocation in chapter 65, as well as from a comparison of their respective terms and provisions, that section 21 has reference solely to the estates of deceased residents. It was not designed to embrace the estates of deceased non-residents. With respect to the latter, the jurisdiction of the court of probate is clearly defined and limited in section 36. In case of an intestate, it is

simply the duty of the judge to order the residue of the estate, after the payment of debts, to be distributed here, or transmitted to the foreign administrator, to be distributed, in either event, according to the law of the place where the deceased had his domicile. So long as there are creditors within the jurisdiction of the ancillary administration, they have a legal right to insist upon having all the assets found there appropriated to the payment of their debts. The court has no authority to order the assets to be transmitted under this statute, until the creditors here are all paid, and it has no jurisdiction to determine that there are no unpaid creditors here until the expiration of the time fixed by law for presenting their claims. *Newell v. Peaslee*, 151 Mass. 601; 1 *Woerner's Am. Law of Ad.*, § 167. For aught that appears all the assets inventoried in this jurisdiction may yet be required to pay the claims of creditors residing here.

No authority to make an allowance to the widow of such non-resident decedent is expressly conferred by this section; nor is it granted by implication as necessary to the discharge of the duties that are expressly imposed. A widow's claim for an allowance is not deemed a matter of legal right either in this State or Massachusetts. It rests merely in the discretion of the judge of probate. *Kersey v. Bailey*, 52 Maine, 198; *Dale v. Bank*, 155 Mass. 141. It is not a fixed and absolute interest in the estate. *Additon v. Smith*, 83 Maine, 554; *Adams v. Adams*, 10 Met. 170. It is not a debt due from the estate nor a distributive share of it. It is not included in the "expenses of administration." *Washburn v. Hale*, 10 Pick. 429.

The widow's allowance was originally designed to afford a temporary supply for the widow and her family pending the settlement of the estate. It had its origin in a humane and beneficent public policy that seeks to encourage the continuance of the family relations by providing against the exigencies arising from the death of the head of the family. *Bailey v. Kersey*, *supra*. When, therefore, a claim for such an allowance from the personal property of her husband is presented by the widow, it is held with substantial uniformity that the question must be determined and the amount regulated by the law of the place where the family resided and had their home at the time of the husband's death. *Gilman v. Gilman*, *supra*; *Shannon v. White*, 109 Mass. 146; *Woerner*, *supra*, § 89. It is conceded by the defendant that such is undoubtedly the law; but it is still contended that without express statutory provisions, after the analogy of the distribution of the assets, and as a matter of comity, the allowance in question was properly granted by the court in this State, and should be sustained if made in accordance with the law of Massachusetts. Whatever may reasonably be urged, *ex comitate* in favor of such a practice in the courts of the situs, in cases where there are no debts, towards domiciliary jurisdictions where the amount of the allowance is definitely fixed by statute, serious difficulties are encountered in attempting to apply it here.

Section 2 of c. 135 of the Pub. Stat. of Massachusetts is made a part of the agreed statement, and is as follows: —

“Such parts of the personal estate of a deceased person as the Probate Court, having regard to all the circumstances of the case, may allow as necessary to his widow, for herself and for his family under her care, or, if there is no widow, to his minor children, not exceeding fifty dollars to any child, and also such provisions and other articles as are necessary for the reasonable sustenance of his family, and the use of his house and the furniture therein for forty days after his death, shall not be taken as assets for the payment of debts, legacies, or charges of administration.”

It will be seen that this statute differs in important particulars from the corresponding statute in this State. There, in case of a will, the allowance may be granted to the widow in addition to the provisions for her in the will (*Williams v. Williams*, 5 Gray, 24); here, by the terms of the statute it is contingent on her waiver of the provisions in the will. It is also manifest that in other respects the nature and office of the allowance are essentially unlike in the two States. There the statute aptly illustrates the original purpose of the allowance, as stated above, while in this State the practical construction has been much more liberal, and the authority to grant an allowance is not confined to cases of mere temporary relief. *Bailey v. Kersey*, 52 Maine, 198. In the recent case of *Dale v. Bank*, 155 Mass. 144, the court says upon this point: “As a result of a uniform line of authorities, the rule is established that the court has no right under the statute to attempt to modify the provisions of a will, or to change the course which property of an intestate takes under the statute of distribution, or to take the estate from creditors to provide for the future of an unfortunate widow who is left dependent on her own resources. The purpose of an allowance is to provide for the necessities of the widow and minor children for a short time, until they have an opportunity to adjust themselves to their new situation.” This is strikingly at variance with the practical construction of the Maine statute; and if the defendant would avail herself of the rule of comity which she invokes, she should at least be able to make it affirmatively appear that the allowance was in fact made in accordance with the Massachusetts statute as construed by the courts of that State. It is not expressly stated, however, to have been made with any reference whatever to the Massachusetts statute. On the contrary it may fairly be inferred, from the statement of the case, and from the comparatively large amount of the allowance, that it was made under the influence of the law and practice of our own State, as in ordinary cases of domiciliary administration here.

But if it be conceded that the judge of probate intended to make the allowance in accordance with the law of Massachusetts, there are still insuperable objections to such a practice under circumstances like those here stated. In the first place, it would be incompatible with the rights of creditors under the provisions of section thirty-six which require all debts to be paid before any of the assets can be remitted to

the place of the domicil. In this case, there may be no creditors in Maine; but that question has not yet been determined, as nearly a year yet remains within which the claims of creditors may be enforced.

Again, the domiciliary court is the appropriate one to determine the amount of the allowance. That is not fixed by the statute in Massachusetts, but is left entirely to the sound discretion of the judge of probate. In performing this duty he is to have "regard to all the circumstances of the case." The social position of the husband at the time of his death, as indicating the demands which might be made on the widow; the style in which she has been accustomed to live, the amount of the estate, and the amount of her separate property, the length of their cohabitation, and the size of the family under her charge, the place of residence, and the treatment of each to the other, and many other like considerations, may all be taken into the account in fixing the amount of the allowance. *Allen v. Allen*, 117 Mass. 27; *Hollenbeck v. Pixley*, 3 Gray, 521; *Washburn v. Washburn*, 10 Pick. 374; *Gilman v. Gilman*, 53 Maine, 184; *Walker*, Applt., 83 Maine, 1. All these things can be more fully and correctly ascertained, and all branches of inquiry respecting them more easily prosecuted in the jurisdiction where the family had their home. Their social position and style of living can be better understood and appreciated in the community in which they have lived. "The place of the domicil is where we should look to ascertain the real condition of the decedent's affairs." *McNichol v. Eaton*, 77 Maine, 249. It appears that the decedent's domicil was in Waltham in the State of Massachusetts at the time of his death. It does not appear that he ever resided in Maine, or that the defendant has ever resided here either before or since the death of her husband. Her domicil was merged in that of her husband.

Another practical difficulty would be met in the application of such a rule of comity. If the defendant is entitled to have an allowance from the assets found in this State, she would have an equal right to it in every other State in which personal property of her husband might be found. Embarrassing questions respecting the numerous claims that might be presented in different jurisdictions would thus inevitably arise.

The conclusion is that the judge of probate in this State had no authority to make the allowance to the widow on the facts stated, and that the item of seven hundred dollars was improperly allowed in the defendant's account.

Whether the defendant's situation would have been improved if she had obtained a decree for an allowance from the Probate Court of Massachusetts, with a representation of insufficient assets there to respond to it, and had then by proper application asked to have the claim satisfied from the assets in this State, subject to the claims of creditors residing here, or whether further legislation authorizing such procedure would be necessary or expedient, are questions not before this court. The question before us has seldom arisen, and no

decision involving the precise state of facts here presented has been brought to the attention of the court. But eminently respectable authorities involving a similar state of facts strongly support the views above stated. In *Richardson v. Lewis*, 21 Mo. App. 531, the domicil of the decedent and his family was in Illinois at the time of his death, and the widow obtained an order from the court there for the payment of an allowance under the laws of that State. There were insufficient assets in Illinois to satisfy the claim, but further assets were found in St. Louis. Thereupon the widow applied to the court in St. Louis for the allowance provided for by the laws of Missouri, and it was held that the Missouri statutes authorizing such allowance had no application to the widows of non-resident decedents, and the application was denied. In the opinion by Judge Thompson the court says: "We rest our decision upon the universal principle of the common law that the succession of the personal property of a deceased person is governed exclusively by the law of his actual domicil at the time of his death." . . . "The statutes invoked are a temporary provision for the widows of deceased persons analogous to the provisions of statutes exempting certain property of debtors from execution. The very nature of such an allowance precludes the idea that the widow can be entitled to it in any State except that of the husband's domicil; for otherwise she would be entitled to this exemption from the claims of his creditors in every State in which he might have personal property."

In *Medley v. Dunlap*, 90 N. C. 527, the decedent had his domicil in Arkansas at the time of his death. His widow soon after removed to North Carolina and there applied for an allowance under the laws of that State. It was held that she was not entitled to it; but in the opinion the court says: "If the laws of Arkansas provide for such an allowance, the plaintiff ought to have applied there and had her claim allowed and paid, or, if there were not sufficient assets to pay it there, then she might have her claim thus allowed, satisfied out of assets in this State, upon proper application to the administrator here. But she cannot reach the assets of her deceased husband here in any other way." See also *Simpson v. Cureton*, 97 N. C. 113; *Spier's Appeal*, 26 Pa. St. 233; *Shannon v. White*, 109 Mass. 146; *Woerner's Am. L. of Ad.* § 80.

*Appeal sustained.*¹

HARVEY v. RICHARDS.

CIRCUIT COURT OF THE UNITED STATES. 1818.

[*Reported 1 Mason, 381.*]

STORY, J.² The question which has now been argued lies at the very foundation of the plaintiff's suit, and is of great importance and no in-

¹ *Acc. Smith v. Smith*, 174 Ill. 52, 50 N. E., 1083; *Short v. Galway*, 83 Ky. 501. — Ed.

² The statement of facts and arguments of counsel are omitted. — Ed.

considerable difficulty. I have taken time to consider it; and after a full consideration of all the authorities, commented on with so much learning and ability by the counsel, I am now to pronounce the result of my own judgment on the case.

For the purposes of the argument, it is assumed or conceded that the testator (dying intestate as to the residue of his estate, of which distribution is now sought) was at his decease domiciled at Calcutta, in the East Indies; that his will has been duly proved, and administration there taken upon his estate by his executor; that the defendant has under the directions of that executor taken administration of the testator's estate in Massachusetts, and in virtue thereof has received a large sum of money, which now remains in his hands; that no part of this money is wanted at Calcutta for the payment of any debts or legacies under the will; and that the plaintiff is a citizen of Rhode Island, and domiciled there; and as one of the next of kin of the testator is entitled to a moiety of the undivided residue of the testator's estate. The question then is, whether, under these circumstances, this court as a court of equity can proceed to decree an account and distribution of the property so in the hands of the defendant, or is bound to order it to be remitted to Calcutta, to be distributed by the proper tribunal there.

There are some points involved in the argument which may be disposed of in a few words. In the first place the distribution, whether made here or abroad, must be according to the law of the place of the testator's domicile. This, although once a question vexed with much ingenuity and learning in courts of law, is now so completely settled by a series of well considered decisions, that it cannot be brought into judicial doubt. In the present case, the law of Calcutta, or rather of the province of Bengal, is, as I apprehend, the law of England; and as that is the same as the law of Massachusetts, the distribution would be the same as if the testator had died domiciled here. In the next place, the court of chancery has an ancient and settled jurisdiction to decree an account and distribution of a testator's and an intestate's estate, on the application of the legatees or next of kin; and supposing this to be a fit case for the application of its authority, the present suit would fall completely within that jurisdiction. In the next place, the equity powers and authorities of the courts of the United States are, in cases within the limits of their constitutional jurisdiction, co-equal and co-extensive, as to rights and remedies, with those of the court of chancery. The present is a suit between citizens of different States over whom this court has an unquestionable right to entertain jurisdiction; and it will follow of course, that the plaintiff is entitled to the relief she prays for, if it be competent and proper for any court of equity to grant it.

Having disposed of these preliminary points, we may now return to the consideration of the great question in controversy. Stated in broad terms it comes to this, whether a court of equity here has competent

authority to decree distribution of intestate property collected under an administration granted here, the intestate having died domiciled abroad, and the distribution being to be made according to the law of his foreign domicile. The counsel for the defendant deny such authority, under any circumstances; the counsel for the plaintiff as strenuously assert it.

This is a question involving the doctrines of national comity, or, what may be more fitly termed, international law. And looking to it as a question of principle, it would not seem to be attended with any intrinsic difficulty. The property is here, the parties are here, and the rule of distribution is fixed. What reason then exists why the court should not proceed to decree according to the rights of the parties? Why should it send our own citizens to a foreign tribunal to seek that justice which it is in its own power to administer without injustice to any other person? I say without injustice, because it may be admitted that a court of equity ought not to be the instrument of injustice, and that if in the given case such would be the effect of its interposition, it ought to withhold its arm. This, however, would be an objection, not to the general authority, but to the exercise of it under particular circumstances. The argument, however, goes the length of denying the existence of that authority, whatever may be the circumstances of the case. Yet cases may be readily imagined in which it might not be inequitable to interfere, nay, in which there might be very cogent reasons for interference. Suppose there are no debts abroad, and no heirs or legatees abroad, but all are here, and apply to the court for a decree of distribution, is the court bound to remit for the vain purpose of putting the legatees or distributees to great expense and delay in seeking their rights in a foreign tribunal? Suppose two executors are appointed by the testator, one abroad and one here (and such cases are not uncommon), and the bulk of the property is collected here, and all the legatees are here, shall the court direct the domestic executor to remit the whole property to the foreign executor because it is to be distributed according to the law of the foreign domicile? Suppose further, the executor here is himself the residuary legatee, or, in case of intestacy, the administrator here is the next of kin and entitled to the surplus, shall he be required to remit the property abroad, that he may be there decreed to receive it again? Suppose legacies, payable out of particular funds here, or a specific legacy of property here, shall not the legatee be entitled to recover of the administrator or executor here, because the testator was domiciled in a foreign country? Suppose a legacy to charitable uses in this country, good by our law, but which, from motives of policy, the courts of the foreign country decline to enforce, shall it be said that our courts are bound to enforce, by remitting the property there, a policy by which they are injured? Whatever may be thought of the last case, there can be no doubt that the others present circumstances where equity would strongly persuade us that it would be the duty of our courts to entertain jurisdiction and decide

on the rights of the parties. There are many other cases in which it would seem fit to vindicate and assert the proper rights of our own citizens and our own laws. This very case, under one aspect, would have presented a question of which our own tribunals might as justly have claimed an exclusive cognizance, and which, I trust, they would have decided with as much impartiality as the tribunals of the testator's domicile. Major Murray was an American citizen, born in Rhode Island; and if he left no lawful heirs (as has been argued in a former part of this case) his property here, supposing he had acquired no foreign domicile, would have undoubtedly fallen as an escheat to that State; and it would deserve consideration whether the change of domicile would work any alteration in that respect. Under such circumstances, would it be proper to send the State of Rhode Island to solicit its rights from a foreign tribunal in the East Indies?

One objection urged against the exercise of the authority of the court is, that as national comity requires the distribution of the property according to the law of the domicile, the same comity requires that the distribution should be made in the same place. This consequence, however, is not admitted; and it has no necessary connection with the preceding proposition. The rule, that distribution shall be according to the law of the domicile of the deceased is not founded merely upon the notion that movables have no situs, and therefore follow the person of the proprietor, even interpreting that maxim in its true sense, that personal property is subject to that law which governs the person of the owner. Nor is it, perhaps, founded upon the presumed intention of the deceased, that all his property should be distributed according to the law of the place of his domicile with which he is supposed to be best acquainted and satisfied; for the rule will prevail even against the express intention of the deceased, unless the mode in which that intention is expressed would give it legal validity as a will. It seems, indeed, to have had its origin in a more enlarged policy, founded upon the general convenience and necessities of mankind; and in this view the maxim above stated flows from, rather than guides, the application of that policy. The only reason why any nation gives effect to foreign laws within its own territory is the endless embarrassment which would otherwise be introduced in its own intercourse with foreign nations. The rights of its own citizens would be materially impaired, and, in many instances, totally extinguished, by a refusal to recognize and sustain the doctrines of foreign law. The case now under consideration is an illustration of the perfect justice and wisdom of this general practice of nations. A person may have movable property and debts in various countries, each of which may have a different system of succession. If the law *rei sitæ* were generally to prevail, it would be utterly impossible for any such person to know in what manner his property would be distributed at his death, not only from the uncertainty of its situation from its own transitory nature, but from the impracticability of knowing, with minute accuracy, the law of succession of every

country in which it might then happen to be. He would be under the same embarrassment if he attempted to dispose of his property by a testament; for he could never foresee where it would be at his death. Nay more, it would be in the power of his debtor, by a mere change of his own domicile, to destroy the best digested will; and the accident of a moment might destroy all the anxious provisions of an excellent parent for his whole family. Nor is this all. The nation itself to which the deceased belonged might be seriously affected by the loss of his wealth from a momentary absence, although his true home was in the centre of its own territory. These are great and serious evils pervading every class of the community, and equally affecting every civilized nation. But in a maritime nation, depending upon its commerce for its glory and its revenue, the mischief would be incalculable. The common and spontaneous consent of nations, therefore, established this rule from the noblest policy, the promotion of general convenience and happiness, and the avoiding of distressing difficulties, equally subversive of the public safety and private enterprise of all. It flowed from the same spirit that dictated judicial obedience to the foreign commissions of the admiralty. *Sub mutuae vicissitudinis obtentu, damus petimusque vicissim*, is the language of the civilized world on this subject. There can be no pretence that the same general inconvenience or embarrassment attends the distribution of foreign effects according to the foreign law by the tribunals of the country where they are situate. Cases have been already stated in which great inconvenience would attend the establishment of any rule excluding such distribution. It may be admitted also, that there are cases in which it would be highly convenient to decline the jurisdiction and remit the parties to the *forum domicilii*. Where there are no creditors here, and no heirs or legatees here, but all are resident abroad, there can be no doubt that a court of equity would direct the remittance of the property upon the application of any competent party.

The correct result of these considerations upon principle would seem to be, that whether the court here ought to decree distribution or remit the property abroad, is a matter, not of jurisdiction, but of judicial discretion, depending upon the particular circumstances of each case. That there ought to be no universal rule on the subject, but that every nation is bound to lend the aid of its own tribunals for the purpose of enforcing the rights of all persons having title to the fund, when such interference will not be productive of injustice or inconvenience, or conflicting equities.

It is farther objected, that a rule which is to depend for its application upon the particular circumstances of each case, is too uncertain to be considered a safe guide for general practice. But this objection affords no solid ground for declining the jurisdiction, since there is an infinite variety of cases in which no general rule has been or can be laid down, as to legal or equitable relief, in the ordinary controversies before judicial tribunals. In many of these the difficulty is intrinsic in

the subject-matter ; and where a general rule cannot easily be extracted, each case must, and indeed ought to, rest on its own particular circumstances. The uncertainty, therefore, is neither more nor less than belongs to many other complicated transactions of human life where the law administers relief *ex æquo et bono*.

Another objection, addressed more pointedly to a class of cases like the present, is the difficulty of settling the accounts of the estate, ascertaining the assets, what debts are sperate, what desperate, and, finally, ascertaining what is the residue to be distributed, and who are the next of kin entitled to share. And to add to our embarrassment, we are told that we cannot compel the foreign executor to render any account in our courts. I agree at once that this cannot be done if he is not here ; but I utterly deny that the administrator here cannot be compelled to account to any competent court for all the assets which he has received under the authority of our laws. And if the foreign executor chooses to lie by, and refuses to render any account of the foreign funds in his hands, so far as to enable the court here to ascertain whether the funds are wanted abroad for the payment of debts or legacies or not, he has no right to complain if the court refuses to remit the assets and distributes them among those who may legally claim them. And as to settling the estate, or ascertaining who are the distributees, there is no more difficulty than often falls to our lot in many cases arising under the ordinary probate proceedings.

All these objections are, in fact, reasons for declining to exercise the jurisdiction in particular cases, rather than reasons against the existence of the jurisdiction itself. It seems, indeed, admitted by the learned counsel for the defendant, that if there be no foreign administration, it would be the duty of the court to grant relief upon an administration taken here. Yet every objection already urged would apply with as much force in that as in the present case. The property would be to be distributed according to the foreign law of the deceased's domicil. The same difficulty would exist as to ascertaining the debts and legacies, and the assets and distributees entitled to share. But it is said in the case now put, the administration here would be the principal administration, whereas in the case at bar it is only an auxiliary or ancillary administration. I have no objection to the use of the terms principal and auxiliary, as indicating a distinction in fact as to the objects of the different administrations ; but we should guard ourselves against the conclusion that therefore there is a distinction in law as to the rights of parties. There is no magic in words. Each of these administrations may be properly considered as a principal one, with reference to the limits of its exclusive authority ; and each might, under circumstances, justly be deemed an auxiliary administration. If the bulk of the property and all the heirs and legatees and creditors were here, and the foreign administration were only to recover a few inconsiderable claims, that would most correctly be denominated a mere auxiliary administration for the beneficial use of the parties here,

although the domicile of the testator were abroad. The converse case would of course produce an opposite result. But I am yet to learn what possible difference it can make in the rights of parties before the court whether the administration be a principal or an auxiliary administration. They must stand upon the authority of the law to administer or deny relief, under all the circumstances of their case, and not upon a mere technical distinction of very recent origin.

I have already intimated my opinion as to the true principle that ought to regulate cases of this nature; and I have endeavoured to answer the most pressing objections satisfactorily at least to my mind. If, therefore, the question were *res integra*, I should have no difficulty in deciding that whether distribution ought or ought not to be decreed should depend upon the circumstances of each case; that no universal rule ought to be laid down on the subject; or at least, that the rule should be flexible, and depend for its application upon the equity of the particular case presented to the court. . . .¹

I have made some researches in the works of foreign jurists for the purpose of ascertaining what is the practice of nations governed by the civil law. Those researches have not been very satisfactory; but they leave little room to doubt that foreign tribunals sustain suits to enforce distribution of assets collected there under auxiliary administrations upon the doctrines so familiar in those courts, that the *situs rei*, as well as the presence of the party, confers a competent jurisdiction. 2 Hub. p. 2, lib. 5, tit. 1, § 43; 1 Hub. p. 1, lib. 3, tit. 13, § 20, *sub finem*; 1 Domat, 531, note; Constit. Frederii. Imp., tit. 1, § 10; Bynk. Quest. Priv. Jur., lib. 1, ch. 16.

Upon the whole my judgment (though delivered with the greatest deference for a different judgment entertained by others) is, that a court of equity here has authority to decree distribution in cases like the present, according to the *lex domicilii*, upon the application of the legatees or the next of kin or other competent parties; that whether it will decree distribution must depend upon the circumstances of each case; and that it is incumbent on those who resist the distribution to establish in the given case, that it may work injustice or public mischief. This doctrine is, as I think, sustained by principles of public policy, and is perfectly consistent with international comity. It stands also commended by its intrinsic equity; and although the authorities are not uniformly in its favor, yet they leave the court at liberty to pronounce that judgment which, if the question were entirely new, it would be disposed to entertain. *Vide* Toller's Law of Executors, 387; 1 Woodes Lect. 384, 385.²

¹ The learned judge here examined several Massachusetts and English cases. — Ed.

² *Acc.* Ewing v. Orr Ewing, 10 App. Cas. 453; Fretwell v. McLemore, 52 Ala. 124; Gibson v. Dowell, 42 Ark. 164 (*semble*); Casilly v. Meyer, 4 Md. 1; Succession of Gaines, 46 La. Ann., 14 So. 602; Parsons v. Lyman, 20 N. Y. 103; *In re* Hughes, 95 N. Y. 55; Carr v. Lowe, 7 Heisk. 84; Porter v. Heydock, 6 Vt. 374; Moses v. Hart, 25 Grat. 795; Estate of Youmans, 10 Hawaii, 207. *Contra*, Richards v. Dutch, 8 Mass.

EMERY v. BATCHELDER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[Reported 132 Massachusetts, 452.]

MORTON, C. J. This is a bill to require the defendants, as executors of the will of Daniel Austin, to reserve and set apart out of the estate of said Austin a fund sufficient to pay the plaintiff an annuity of four hundred dollars a year, given to her by the will.

It appeared at the hearing that the testator was a citizen of the State of Maine; that he died in December, 1877, in Kittery in that State; that his will was duly proved there in March, 1878, and the defendants were duly appointed and qualified as executors; that the defendants, who are residents of this Commonwealth, proved, in June, 1878, the will in the Probate Court for the county of Suffolk, and ancillary letters testamentary were issued to them; that, in October, 1880, the said executors filed their final account in the Probate Court for Suffolk County, showing that the balance in their hands was paid to said executors as executors under the appointment of the Probate Court in Maine, which account was allowed.

It also appeared that the estate now in their hands as such executors is not sufficient to pay all the legacies in full; and the question which the plaintiff desires to raise by this bill is, whether the annuity given to her is to abate in common with the other legacies, or is to be paid in full in preference to them.

It is too well settled, as a general rule, to admit of any doubt, that an executor or trustee appointed by judicial decree of a court of another State is accountable only in the courts of that State for the due execution of the trust, and the trust cannot be enforced in this Commonwealth, although the executor or trustee resides here. *Jenkins v. Lester*, 131 Mass. 355, and cases cited.

The plaintiff contends that this case is taken out of the general rule by the fact that the will was proved here, and ancillary letters testamentary issued to the defendants. Whether, if the defendants had now in their hands as such ancillary executors any balance for which they are liable to account to the Probate Court of Suffolk County, this court could and would entertain jurisdiction of a bill like this, which affects the rights of all the other legatees and the marshalling and distribution

506. In Pennsylvania there appear to be two lines of authority. One line holds that the court of ancillary administration must transmit the balance to the court of principal administration for final distribution. *Appeal of Barry*, 88 Pa. 131. The other line holds that such transmission is discretionary with the court. *Welles's Estate*, 161 Pa. 218, 28 Atl. 1116. These conflicting authorities have not been reconciled. *Laughlin v. Solomon*, 180 Pa. 177, 180.

The court should not retain the balance until it is satisfied that the foreign assets are sufficient to pay all claims against the estate. *Hutton v. Hutton*, 40 N. J. Eq. 461; *Hamilton v. Levy*, 41 S. C. 374, 19 S. E. 610. — ED.

of the whole estate, is a serious question which we are not required to consider. The defendants have not in their hands any funds as executors appointed in this State. They have transmitted the balance of the estate which was in their hands as such executors to themselves as executors in Maine, and this has been allowed and approved by the Probate court of Suffolk County.

Our statutes provide that, where ancillary administration is taken out in this State, upon the settlement of the estate, after the payment of the debts for which it is liable in this State, the residue of the personal estate may be distributed according to the will, "or in the discretion of the court it may be transmitted to the executor or administrator, if there is any, in the State or country where the deceased had his domicil, to be disposed of according to the laws thereof." Gen. Sts. c. 101, §§ 38, 39.

The allowance of the final account, in which the defendants credited themselves with the residue in their hands as paid to the executors in Maine, was in effect an order of the court that such residue should be transmitted to the defendants as principal executors appointed in Maine. If the executors in the two States had been different persons, it is clear that the executors here could not be held accountable in our courts after they had, under an order of the Probate Court, transmitted the balance in their hands to the executors in Maine. They then would have fully administered the estate here, and there would be nothing upon which a decree of the court here could act.

The principle is the same where the executors in the two States are the same persons. They act in each State in a different capacity, and are in law regarded as different persons. When the defendants acting as executors in Massachusetts transmitted the estate in their hands, as such executors, to themselves, acting as executors in Maine, they had performed all their duties in Massachusetts, and were no longer accountable as executors here. They thereby placed the whole of the estate of the testator within the jurisdiction and control of the courts of Maine, and are accountable for it there. We are of opinion that this jurisdiction is exclusive, and that this court cannot entertain a bill in equity, for the purpose of construing the will and marshalling and distributing the estate.

*Bill dismissed.*¹

¹ In a similar case where the property so carried to the foreign account was brought back again into the State, it was held that it could not again be administered within the State. *Spradling v. Pipkin*, 15 Mo. 118.

After the ancillary account is allowed, the administrator is chargeable in the State of principal administration with the amount of the balance. *Jennison v. Hapgood*, 10 Pick. 77; *Conover v. Chapman*, 2 Bail. L. 436. It has been held that the account can be reopened in the State of principal administration. *Leach v. Buckner*, 19 W. Va. 36. — ED.

SECTION II.

WARDSHIPS.

IN RE KNIGHT.

COURT OF APPEAL. 1898.

[Reported [1898] 1 *Chancery*, 257.]

IN August, 1894, Agnes Maria Knight, widow, a resident in the Island of Jersey, was found by an order of the Royal Court of Jersey a person of unsound mind, and a gentleman resident in Jersey was, under the laws of the island, appointed curator of her property and person. The personal estate of the lunatic comprised a sum of Consols and also shares in an English bank and an English limited company all standing in her name. The curator accordingly presented a petition in Lunacy under section 134 of the Lunacy Act, 1890, asking for an order for transfer of the stock and shares into his name. Upon the petition coming before the judge in Lunacy, it was supported by an affidavit by the curator showing that the property required to be transferred was to be used for the maintenance or sole benefit of the lunatic; but the judge made a note that the affidavit "did not show that the money was needed for maintenance or for any other purpose of the lunatic." The curator, however, contended that, having been appointed in Jersey and having undertaken to get in the property of the lunatic, he was entitled as of right to have the stock and shares transferred to him, and that the court had no jurisdiction to deal with the lunatic's property beyond ordering a transfer of it to him, the curator, who was responsible to the Jersey court for the due application thereof. The curator then filed a further affidavit stating that according to the law of Jersey the whole personal estate of a person to whom a curator had been appointed by the royal court of Jersey vested absolutely in such curator, who was able to deal with the same absolutely as directed by his electors, being persons who in the present case had, under the direction of the Jersey court, made an inquiry into the mental condition of the lady. Upon the petition coming before him again on that affidavit the judge ordered the petition to be adjourned into court for argument on the question of jurisdiction.¹

LINDLEY, M. R. We all take the same view of this case. It was urged before the judge in Lunacy, sitting in chambers, that he had no jurisdiction in the matter, and the case was adjourned into court to have that point decided. I am clearly of opinion that Mr. Wood has put his case too high, and that it is not our duty to make an order parting with the possession of the lunatic's property without exercising some discretion in the matter. The section of the Lunacy Act, 1890,

¹ Arguments of counsel are omitted. — Ed.

dealing with this property, that is, with stock that cannot be transferred without an order, is section 134, which runs thus: [His Lordship read the section, and continued:—]

Now, Mr. Wood has brought himself within this section so far as it gives him the right to make this application. In *In re Brown* this court put an extensive rather than a restrictive interpretation on the words “vested in a person appointed for the management” of the property of the lunatic; and having regard to that decision, we are quite right in saying that the personal property of this lady has become “vested” in the applicant according to the law of Jersey within section 134 and the decision in *In re Brown*, [1895] 2 Ch. 666.

Then comes the question, What ought we to do? We should be running counter to what has been the established practice for the last one hundred years or more, if we were to hold that the court has no discretion in such a case as this. Mr. Wood has referred us to *Julius v. Bishop of Oxford*, 5 App. Cas. 214; but that case does not appear to carry him through at all. If we have property of a lunatic here, it is, to my mind, clear almost to demonstration that we have a discretion under section 134 as to granting or refusing such an application as this. Section 90 says, in sub-section 1, that “The judge in Lunacy may upon application by order direct an inquisition whether a person is of unsound mind and incapable of managing himself and his affairs.” Then sub-section 2 says: “Where the alleged lunatic is within the jurisdiction, he shall have notice of the application and shall be entitled to demand an inquiry before a jury.” Then section 96 says: “Where the alleged lunatic is not within the jurisdiction it shall not be necessary to give him notice of the application for inquisition, and the inquisition shall be before a jury.” The section, it will be observed, says “shall.” Now just consider the effect of those sections. The law is not new: it is as old as the time of Lord Hardwicke, that in the case of a person resident abroad and having property in this country, the court has jurisdiction to direct an inquisition as to such person and to appoint a committee of that property. So that, if anybody were to apply here for an inquisition as to the sanity of this lady, the court would have jurisdiction to appoint a committee of the property of this lady within the jurisdiction, and to administer her estate. How, then, can it be incumbent upon this court, without exercising any discretion at all, to hand over this property to a foreign curator? If Mr. Wood’s contention is right, the court would lose the jurisdiction which it clearly has over a foreign lunatic’s property in this country. The real truth is that the jurisdiction of the court over lunatics who have property within the jurisdiction cannot be ousted by such ambiguous words as we find in section 134. The point was to some extent considered in *In re Brown*, *supra*, where it was said that the court must be cautious not to hand over the property unless a proper case was made out. There the court was satisfied that the property

was, in fact, required for the maintenance and support of the lunatic, who was resident in Victoria, and, therefore, made an order under section 134 for a transfer of funds in this country belonging to the lunatic to the Master in Lunacy in Victoria.

For the reasons I have given, and having regard to the terms of section 134 and comparing the terms of section 134 with sections 90 and 96, and also having regard to the long-established practice as to the jurisdiction of this court, I am clearly of opinion that Mr. Wood has put his case too high, and that the court has jurisdiction to exercise its discretion as to making an order such as is now asked for. This case was adjourned into court to have the question of jurisdiction decided. The application must stand over in order that the applicant may be at liberty to file further evidence showing that the fund is required for the maintenance of the lunatic according to the law of Jersey, and the grounds upon which the transfer of the stock should be made.

RIGBY, L. J. I am of the same opinion. We should not only be overruling, if not extinguishing, long-established authorities, but deciding something quite novel, if we were to hold that under section 134 the court has no discretion. No doubt, *prima facie* the proceedings in Lunacy abroad should be treated with all respect here, and in this case it may very well be that, acting upon our discretion, we may ultimately make the order asked for under section 134; that, however, must depend upon the nature of the further evidence that may be filed by the applicant. But, in my opinion, the point, which is the only one now before us, namely, whether we have a discretion, must be decided against the applicant.

VAUGHAN WILLIAMS, L. J. I am of the same opinion.

LINDLEY, M. R. We give the applicant leave to bring in a further affidavit. It is his duty to get in as much of the lunatic's property as he can.¹

IN RE CHATARD'S SETTLEMENT.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1899.

[Reported [1899] 1 Chancery, 712.]

PETITION. By a settlement made on the marriage of François Guillaume Eugène Chatard and Sarah his wife (formerly Sarah Barnes, spinster), and dated October 10, 1845, a sum of £2,000, £3 5s. per cent Reduced Annuities, which had been transferred into the names of trustees, was settled upon trust during the joint lives of the husband and wife to pay the annual produce to the wife as a separate and inalienable provision for her during her coverture, and after the decease

¹ *Acc. Murray v. Baillie*, 21 Scot. Jur. 239. — ED.

of either of them upon trust to pay the annual proceeds to the survivor of them during his or her life, and after the decease of the survivor upon trust for such one or more exclusively of the other or others of the children or remoter issue of the marriage as the husband and wife should by deed, or the survivor of them should by deed or will, appoint.

There were issue of the marriage two daughters, one of whom, Sarah Ann Eugénie Chatard, intermarried with Louis Eugène Ballot, who was a French subject and domiciled in France, and died in the lifetime of her mother, Sarah Chatard, leaving two children of her marriage with Louis Eugène Ballot her surviving, namely, a daughter, Fernande Ballot, born on August 24, 1881, and a son, Charles Ballot, born on November 14, 1886.

In the year 1866 Robert Malcolm Kerr, the sole surviving trustee of the settlement of October 10, 1845, paid and transferred the trust fund into court under the provisions of the Trustee Relief Act; and by an order dated December 12, 1866, the interest accruing on the fund in court was directed to be paid to Sarah Chatard during her life for her separate use.

François G. E. Chatard died on February 14, 1893.

Sarah Chatard died on June 3, 1898, having by her will, dated July 13, 1896, in pursuance of the power given to her by the settlement, appointed and directed that the trust fund should be held in trust for Fernande Ballot and Charles Ballot, to be equally divided between them, share and share alike.

The funds subject to the settlement were now represented by a sum of £2,001 0s. 3d. New Consols and £26 12s. cash standing to the credit of this matter.

This petition was presented by Fernande Ballot and Charles Ballot, both of Paris, by Louis Eugène Ballot, their father and lawful guardian and next friend, praying that the funds in court might be dealt with by paying thereout a sum of cash due to the legal personal representative of Sarah Chatard and the costs of the applicants, and dividing the residue in moieties, and paying one moiety to Louis Eugène Ballot as the guardian of Fernande Ballot, and the other moiety to Louis Eugène Ballot as the guardian of Charles Ballot.

By the 14th paragraph of the petition it was stated as follows: "By the law of France the said Louis Eugène Ballot as the legal guardian of your petitioners is entitled to receive and give legal discharges for all monies coming to his children during their minority."

By the suggestion of his Lordship the case was argued in the first instance on the footing that this statement was strictly proved.¹

KEKEWICH, J. This case has been argued at my suggestion on the footing that the 14th paragraph of the petition is strictly proved. [His Lordship read the paragraph and continued:—]

I apprehend that, assuming that statement to be true, it would be

¹ Arguments of counsel are omitted. — ED.

quite right for me, if I thought fit, to direct the payment as asked. And further, if the fund had not been paid into court the trustee would have had a legal discharge if he had paid the money of the infants to their guardian. But it seems to me that the question now is whether I am bound to do that. Here are two infants who are entitled under a settlement to the fund which has been paid into court. If I am bound to pay the fund to their guardian, of course I must do my duty. If I am not so bound, then I have a discretion in the matter which I must exercise on proper materials, which are not at present before me.

The point is put as one of principle supported by some authority. In two of the cases which have been referred to, namely, *In re Crichton's Trust*, 24 L. T. (o. s.) 267, and *In re Ferguson's Trusts*, 22 W. R. 762, before the Master of the Rolls in Ireland, the infants whose property was dealt with were Scottish. In each case the infant had reached the age of puberty, as established by the law of Scotland, and though not *sui juris* in England, was competent to give a discharge in Scotland. That, of course, in itself makes a difference. But further than that, according to Scottish law, as was proved in the Irish case and was capable of proof in the English case, security is required to be given by the curator truly to account for all sums received on behalf of the minor. That seems to me to make a considerable difference, sufficient to distinguish those cases from the present one. From the other cases which have been cited I do not derive much assistance. In the case of *In re Brown's Trust*, 12 L. T. 488, a fund devolving upon an infant under a settlement made according to the law of Prussia was ordered to be paid to the father as guardian, upon evidence that "by the law of Prussia he was entitled in that character to receive the fund and administer it during the infant's minority." That is exactly what the petition says here, and Wood, V.-C., on hearing the evidence, made the order. What evidence there was which influenced the judge it is not easy to say. The report of the case is a very short one. No argument is reported on the part of the counsel for the petitioner, and no one appeared on behalf of the respondent. I do not think it is a case which can be relied on as establishing a principle. *In re Hellmann's Will*, L. R. 2 Eq. 363 is still further off. Mr. Ingpen properly called my attention to it, though it is not altogether in his favour. The editor of Simpson on Infants suggests that it ought not to be followed. I think that, at all events for the present purpose, it ought not to be regarded. It was the case of a petition under Lord St. Leonards' Acts, 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, which enabled trustees to apply to the Court of Chancery for the opinion or direction of the judge respecting the management or administration of trust property. I think I ought to bear in mind how petitions under the Acts were commonly drawn, namely, by stating all such facts as would induce the court to make the order desired, and the petition in the case in question may have been drawn upon that basis. Apart from the fact that the Master of the Rolls in that case did not take the same view as the

petitioners did, I think that a decision on a petition under those Acts cannot possibly be treated as a decision that a person in the position of this French guardian is entitled as of right to have the fund in court paid to him. It appears to me that I ought to consider whether, when the fund is handed over to the guardian, it will be properly applied for the benefit of the infants, and whether it is not better that it should remain here and be paid to them when they attain their majorities. If, for instance, it were proved that they were amply provided for, why should I pay it over so that it may be spent in a way which, for aught I know, may not be for their benefit? Evidence may be forthcoming which will satisfy me; but I am not asked to pay out on that footing, but to pay it to this guardian as a matter of right. Assuming that he is entitled to give a receipt, I should be perfectly within my right if I paid it to him, and nobody could say I had acted contrary to law; on the other hand, it seems to me that having the custody of the fund for the infants, I ought not to pay it over unless I think that in their interest that ought to be done. Mr. Ingpen also cited two other cases as to the appointment of guardians. They may be useful on that branch of the law, but I do not think they apply with sufficient directness to the case before me.

Mr. Ingpen has not referred me to a class of cases — to which I can refer only by memory — in which the court has had to consider whether, in the case of a foreign lunatic being entitled to a fund in court, the curator or other person appointed to act, and acting under the control of the foreign court, was entitled to have the money paid him on behalf of the lunatic. The case with which we are best acquainted is *In re Barlow's Will* [1887], 36 Ch. D. 287, but there are several other cases, both in this court and in the Court of Appeal (see *In re Brown*, [1895] 2 Ch. 666; *In re De Linden*, [1897] 1 Ch. 453; *In re Knight*, [1898] 1 Ch. 257; cited in *Lewin on Trusts*, 10th ed. pp. 416, 417), and, unless I am in error, the court has always required to be satisfied that the money is to be paid over to the foreign official for some purpose to which it is his duty to apply it.

Accordingly, I shall be willing to consider any evidence which may be laid before me in reference to the proposed application of the money, and the case may be put in the paper again for that purpose.

[The matter was again brought before his Lordship in chambers on Monday, March 29, but as no satisfactory evidence was then offered to enable him to exercise his discretion he directed that (subject to any application on further evidence) the costs should be paid out of the fund, and the balance carried over to the separate account of each infant, and the income accumulated.]¹

¹ *Acc. Ponder v. Foster*, 23 Ga. 489; *Earl v. Dresser*, 30 Ind. 11; *In re Wilson*, 95 Mo. 184, 8 S. W. 369; *Douglas v. Caldwell*, 6 Jones Eq. 20; *Ex parte Smith*, 1 Hill Eq. 140; *Clendenning v. Conrad*, 91 Va. 410, 21 S. E. 818. In several States it is provided by statute that a foreign guardian of a non-resident may apply to the Probate Court for the payment over to him of the ward's personal property. *Grimmett*

DIDISHEIM *v.* LONDON AND WESTMINSTER BANK.

COURT OF APPEAL. 1900.

[Reported [1900] 2 *Chancery*, 15.]

LINDLEY, M. R.¹ This action is by M. Didisheim and by Madame Goldschmidt; by him as her next friend. The object is to obtain a large sum of cash and also share and stock certificates and scrip for bearer bonds and shares of great value from the defendants. The defendants are quite ready to pay and deliver these up provided they

v. Witherington, 16 Ark. 377; *In re Benton*, 92 Ia. 202, 60 N. W. 614; *Martin v. McDonald*, 14 B. Mon. 544. This statute, however, does not affect the power of the court in its discretion to refuse the application. *In re Wilson*, *supra*.

The general principles governing the administration of the estate of a foreign ward are the same as those applied to the administration of a foreign decedent's estate. A guardian must be appointed for the personal property of the ward in each State in which property is situated. *Hoyt v. Sprague*, 103 U. S. 613; *Kraft v. Wickey*, 4 G. & J. 332; *Morrell v. Dickey*, 1 Johns. Ch. 153. If a balance is ordered by one State to be carried into another, the guardian is accountable for it in the latter. *Jefferson v. Glover*, 46 Miss. 510.

A foreign guardian cannot sue. *Morgan v. Potter*, 157 U. S. 195; *Smith v. Mad-den*, 78 Fed. 833; *Verrier v. Verrier*, 7 Phila. 618. He may however bring on his ward's behalf a petition in a foreign probate court; such a proceeding is not bringing suit. *McCleary v. Menke*, 109 Ill. 294; *Earl v. Dresser*, 30 Ind. 11. A foreign guardian cannot be sued. *Donley v. Shields*, 14 Oh. 359. Nor can he be called to account in any but the court that appointed him. *Burnet v. Burnet*, 12 B. Mon. 323; *Bell v. Suddeth*, 2 Sm. & M. 532. Nor will consent of all parties confer jurisdiction on the foreign court to settle the accounts. *Anderson v. Story*, 53 Neb. 259, 73 N. W. 735. The account must be settled in each State for the property there belonging. *Smoot v. Bell*, 3 Cr. C. C. 343. It has been held, however, that if the guardian and infant ward remove to a foreign State and the ward there comes of age, he may sue for money had and received for the money due him from the guardian, since he cannot have an account. *Pickering v. De Rochemont*, 45 N. H. 67.

A guardian has of course no power to convey or to manage foreign land. *Smith v. Wiley*, 22 Ala. 396; *McNeil v. First Congregational Society*, 66 Cal. 105, 4 Pac. 1096; *Watts v. Wilson*, 93 Ky. 495, 20 S. W. 505; *Bailey v. Morrison*, 4 La. Ann. 523. And if land of the ward is sold by order of court, or taken by proceedings in eminent domain, the proceeds will be retained by the court, and only the income remitted to the foreign ward. *Clay v. Brittingham*, 34 Md. 675; *In re Department of Public Works*, 89 Hun, 529, 35 N. Y. Supp. 332. But see *Johnson v. Avery*, 11 Me. 99.

If the guardian who comes into possession of certificates of stock in a foreign corporation assigns the stock, the assignee may have the stock transferred to his name on the books. *Ross v. S. W. R. R.*, 53 Ga. 514. It has been held, however, that since a guardian (unlike an administrator) gets no title to the ward's property, he cannot follow into another jurisdiction property once reduced by him to possession and wrongfully taken from him, but suit must be brought by a guardian appointed in the State into which the property is taken. *Grist v. Forehand*, 36 Miss. 69.

The management of the entire property of a ward, it has been held, should be uniform, and in accordance with the law of the domicile. *Lamar v. Micou*, 112 U. S. 452. — Ed.

¹ Part of the opinion only is given. — Ed.

can safely do so. The bulk of the property sought to be recovered formed part of the assets of M. Goldschmidt, a deceased gentleman, domiciled and resident in Belgium. He died some time ago, and his widow, the plaintiff, Madame Goldschmidt, obtained letters of administration with his will annexed. By her directions most of the property in the hands of the defendants has been placed in their books in her name. She is domiciled in Belgium and is resident abroad. She has become insane and is in a foreign lunatic asylum. M. Didisheim has been duly appointed her "administrateur provisoire," with power to collect and get in all her personal estate. He is also now the legal personal representative of M. Goldschmidt, having obtained letters of administration to his personal assets left unadministered by Madame Goldschmidt. He and she together, therefore, are clearly entitled to all the property sought to be obtained from the defendants. They do not deny M. Didisheim's right as administrator to such assets of the deceased as have not become Madame Goldschmidt's property; but they say that, owing to what she did when sane, all his assets in their hands became hers, and they are now accountable to her alone for them. As to the cash, certificates and scrip which are the property of Madame Goldschmidt, the defendants say they cannot safely hand them over to M. Didisheim, as the ownership of them is still vested in her and has not been legally vested in M. Didisheim. NORTH, J. has held that, unless an order is made in lunacy requiring or authorizing the defendants to deliver the property of Madame Goldschmidt to M. Didisheim, they cannot safely deliver such property to him.

The relations and friends of Madame Goldschmidt are particularly desirous of avoiding any formal adjudication of lunacy, and this appeal has been brought on purpose to avoid the necessity of such an adjudication. The title of the plaintiffs, it will be observed, is a purely legal title; there is no trust in the case. Under the old practice one action could not have been maintained to enforce a claim by M. Didisheim as administrator and also a claim by Madame Goldschmidt to recover her own property. Two separate actions of detinue or trover would have been necessary. Our modern practice, however, is less rigid, and the defendants have raised no objection to the two claims being joined in one action. The court, therefore, can properly entertain the action and decide the real question raised by the defendants, which is whether, in an action brought by M. Didisheim in his own name and in the name of Madame Goldschmidt and as her next friend the High Court ought to make an order for the delivery to him of her property. The question may be put in another way, whether he is entitled in an action so framed to demand delivery of her property to him. We are of opinion that he is.

In *Scott v. Bently*, 1 K. & J. 281, a person resident in Scotland was entitled to an annuity charged on land in England and secured by a covenant entered into with himself. The annuitant became lunatic,

and a *curator bonis* was appointed according to Scottish law. Whether he was judicially declared a lunatic does not distinctly appear; nor does it appear that the ownership of his personal property was by Scottish law divested from him and vested in his curator. We rather infer that the curator merely had power to collect it and get it in. The annuity being in arrear, the curator brought a suit in Chancery in his own name against the executrix and devisee in trust of the grantor of the annuity for payment of the arrears and for payment of the annuity in future. It is to be observed that the demand of the plaintiff was a purely legal demand. He sought to enforce the legal right of the annuitant under the covenant and grant. But the arrears seem to have been set apart as a trust fund, and this was held enough to give the Court of Chancery jurisdiction to entertain the suit. Wood, V.-C., made an order as prayed by the bill. This decision has been much questioned; but unless it be that the suit ought in strictness to have been in the name of the lunatic by his curator as next friend, we see no ground for doubting the correctness of the decision.

Scott v. Bentley, *supra*, has been questioned mainly because it proceeded to some extent on the supposed authority of a decision in the House of Lords on an appeal from Scotland, in *In re Morrison's Lunacy*, Mor. Dict. 4595, 1 Cr. St. & P. 454. This case appears to have been to some extent misunderstood. The Vice-Chancellor refers to it as an unreported case cited in *Johnstone v. Beattie*, (1843) 10 Cl. & F. 42, and in *Sill v. Worswick*, (1791) 1 H. Bl. 677-8, 2 R. R. 816. In *Johnstone v. Beattie*, 10 Cl. & F. 97, Lord Brougham refers to *Morrison's Case*, *supra*, as cited in the note to *Sill v. Worswick*, *supra*, and as an authority for the proposition that the legally appointed curator in one country was held entitled to act in another. This, it is plain, was also Wood, V.-C.'s, view of *Morrison's Case*, as is apparent from his remark (1 K. & J. 285) that in *Morrison's Case* the curator sued alone. But the reports of that case to which we have referred, *supra*, show that the decision of the House of Lords in *Morrison's Case* did not go that length, and Lord Campbell was not satisfied that it did (10 Cl. & F. 133). We understand the decision as showing that a committee appointed in England of a Scotsman resident in England could not sue in Scotland simply in his own name and as committee for the recovery of the lunatic's personal estate; but that such committee could sue there in the name of the lunatic for the recovery of the lunatic's personal estate. *Morrison's Case*, therefore, did not go so far as Wood, V.-C., thought, but it goes a long way to show that the proceedings in this action are properly framed; for this action is brought, not only by M. Didisheim in his double capacity of administrator of Madame Goldschmidt and curator of Madame Goldschmidt, but also by her in her own name suing by M. Didisheim as her next friend. In *Scott v. Bentley*, *supra*, Wood, V.-C., did not by any means base his judgment only on the supposed decision in *In re Morrison's Lunacy*, *supra*, and after making every

allowance for his misapprehension in that case, *Scott v. Bentley* was, in our opinion, well decided, although we cannot help thinking that, if Wood, V.-C., had known the form of the order made in Morrison's Case, he would have directed the bill to be amended by making it in form a bill by the lunatic by his curator and next friend.

In *Alivon v. Furnival*, 1 C. M. & R. 277, 286, 40 R. R. 561, Parke, B. expressed a clear opinion to the effect that a foreign curator could sue here in his own name for goods and chattels of a person of unsound mind.

Scott v. Bentley, *supra*, is consistent with and is really supported by several other cases cited by Mr. Haldane, and of which *Re Tarratt*, 51 L. T. 310, *In re De Linden*, [1897] 1 Ch. 453, and *Thiery v. Chalmers*, Guthrie & Co., [1900] 1 Ch. 80, are the most recent and important. In *In re De Linden*, an application was made on behalf of a Bavarian lunatic lady for payment out to two foreign gentlemen of some money in court belonging to her. The application was by her in her own name by her next friend, who was a Bavarian judge and one of two persons appointed by a Bavarian court to take charge of her and her property. The order was made as asked — that is, for payment, not to her, but to the two persons appointed as above mentioned. The lady had been judicially declared lunatic, but there was no judicial vesting of her property in the curators.

Thiery v. Chalmers, Guthrie & Co., *supra*, was a similar case. The lunatic there was a French subject declared lunatic in France, and whose property was placed under the care of a duly appointed *tuteur*. An action was brought in this country by the lunatic by a next friend and by the *tuteur* as a co-plaintiff to recover money and securities in the hands of the lunatic's bankers. An order was made for the delivery of them to the *tuteur*. Kekewich, J., thought that the *tuteur* might have sued alone in his own name. He regarded the decision in *In re Brown*, [1895] 2 Ch. 666, as an authority for so holding, inasmuch as both in *In re Brown* and in *Thiery v. Chalmers*, Guthrie & Co. the lunatic had been formally so declared by the foreign court. But *In re Brown* was not an action; it was an application to the Court in Lunacy under section 134 of the Lunacy Act, and we doubt whether the action in *Thiery v. Chalmers*, Guthrie & Co. would have been rightly framed if brought by the *tuteur* as sole plaintiff.

An alteration in the status of a lunatic appears to be necessary in order to enable the Court in Lunacy to exercise the jurisdiction conferred upon it by section 134 of the Lunacy Act, 1890; but it by no means follows that persons, whose status has not been altered by their being judicially declared lunatic cannot sue by themselves by a next friend for the recovery of their own property. *In re Knight*, [1898] 1 Ch. 257, turned on the discretion which the court had under section 134 of the Lunacy Act, and throws no real light on this case.

The only difficulty in the way of the plaintiffs is occasioned by *In re Barlow's Will*, 36 Ch. D. 287. In that case a colonial statute vested

in a Master in Lunacy the care and custody of the property of lunatic patients — that is, of persons confined in lunatic asylums but not judicially declared lunatic. A colonial lady, confined in a lunatic asylum in the colony, was entitled to some funds in the hands of trustees in this country, and the colonial Master in Lunacy claimed these funds. The trustees paid them into court under the Trustee Relief Act. The colonial Master and the lady by her next friend presented a petition for the transfer of the funds in court to the colonial Master in Lunacy. The court made an order for the payment out of capital of some past maintenance and for the payment of the income to the master whilst the lady continued in an asylum. But the court would not order the rest of the corpus to be paid over to the master. It is to be observed that the general statutory authority given by the Colonial Act to the master as an officer of the colonial court was not supplemented by any order giving the master any express authority, as the lunatic's attorney, to get in any property not locally within the jurisdiction of the court; and, as we understand Cotton, L. J.'s judgment, he was much influenced by the omission of any such order. If the master's authority derived from the colonial statute was unsatisfactory, it is obvious that such authority was not improved by his assumption of the right to use the lunatic's name. In that view of the case, the fact that the lunatic petitioned in her own name by her next friend did not remove the difficulty. Having decided that the master was not entitled as a matter of right to demand payment to himself, it became necessary for the court, acting as trustees, to consider what it was the duty of trustees to do in such a case as that before them; and they considered that in such a case the trustees ought not to part with the trust fund without seeing to its application, and ought not to part with the fund to the master further than they were satisfied that the interests of the lunatic rendered it necessary to do so. This was the view taken in *In re Garnier*, L. R. 13 Eq. 532, where, however, the lunatic was a domiciled Englishman, and we see no reason to dissent from it where the authority of the foreign curator to get in the trust property is regarded by the court as unsatisfactory. But where it is not, the considerations which weighed with the court in *In re Barlow's Will*, *supra*, do not arise. A person absolutely entitled to trust money is entitled to have it paid to him or to any one duly appointed by him to receive it, and the trustees or the court acting for them have no discretion to refuse payment. The same principle is, in our opinion, applicable to the case in which trust money belongs to a lunatic and a person is duly appointed by a competent authority to get in such money for the lunatic. If the title of the lunatic is clear, and the authority to act for him is equally clear, we fail to see what discretion the court, acting for the trustees, has in the matter. The trustees may properly say that they cannot safely act without the sanction of the court, but we fail to see what other discretion there is. Where the lunacy jurisdiction is being exercised, as it was in *In re Stark*, 2 Mac. & G. 174,

other considerations at once arise. If, as in *In re Garnier, supra*, the lunatic were an Englishman temporarily abroad, and confined as a lunatic abroad, we should feel considerable difficulty in holding that the courts of this country were bound to recognize the title of a foreign curator to sue in this country. But here we are dealing with an alien domiciled abroad, and over whom the courts of this country have no jurisdiction except such as is conferred by the fact that she has property here. All that the court here has to do is to see that the person claiming it is entitled to have it.

In this case the order of the Belgian court of November 25, 1899, removes all doubt as to M. Didisheim's authority to take these proceedings and to obtain and give a good discharge for the property which he seeks to recover. On general principles of private international law, the courts of this country are bound to recognize the authority conferred on him by the Belgian courts, unless lunacy proceedings in this country prevent them from doing so. What ought to be done in lunacy has not to be considered, and we say nothing on this subject. In our opinion, the appeal should be allowed, and an order be made as asked by the claim. But the plaintiffs must pay all the costs; for the bank was perfectly justified in not complying with M. Didisheim's demands without an order of the High Court—that is, without proving his title in such a way as to make it unreasonable for the bank to refuse to recognize it. Under the old practice an action of detinue or trover might have failed; for under the general issue the defendants could have given in evidence facts excusing delivery to a person rightfully entitled, but whose title was not such as the defendants could safely recognize. See per Blackburn, J., in *Hollins v. Fowler*, (1875) L. R. 7 H. L. 766, and the cases there cited. But in practice, if in such a case the plaintiff proved his title to the satisfaction of the court and paid the defendant's costs, the plaintiff always obtained delivery. Under the modern practice, if this case had been tried by a jury there would be no difficulty, we apprehend, in ordering delivery to M. Didisheim, and, in a proper case like this, giving the defendants the costs of the action—that is, there would be good cause for making the plaintiffs pay the costs, although they succeeded in establishing their title. See *Gleddon v. Trebble*, 9 C. B. (N. S.) 367. If the action were tried without a jury, whether in the Chancery Division, as this was, or in the Queen's Bench Division, the costs would be in the discretion of the judge, and there would be no difficulty in ordering delivery to the plaintiffs and ordering them to pay the costs. However tried, any other result would be very unjust.

Mr. Terrell suggested that the order of the court would not protect the bank if the lunatic were to recover and were to sue the bank for her money and property after the bank had paid and delivered it to M. Didisheim. We do not entertain any misgiving on this point. The High Court clearly had jurisdiction to entertain the action and to decide the questions raised in it, and to make the order which this

court now declares it ought to have made; and this court clearly has jurisdiction to entertain this appeal. This being clear, and the Belgian court having had jurisdiction to make the order which it made, the bank would unquestionably have a perfectly good defence to any action which the lunatic could bring against it, either by another next friend or by another official curator, or by herself if she should recover.¹

Omit to 259

SECTION III.
INSOLVENT ESTATES.

MAY v. WANNEMACHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1872.

[*Reported 111 Massachusetts, 202.*]

TRUSTEE process against Charles Wannemacher and Joseph Maxfield, surviving partners of the firm of N. Sturtevant & Company, on promissory notes indorsed by the firm. John Borrowscale was summoned as trustee of the defendants. Writ dated June 6, 1865.

The case, as it appeared from the answer of the trustee and an agreed statement of facts, upon which it was submitted to the judgment of the Superior Court, was as follows:—

The firm of N. Sturtevant & Company was composed of the defendants, both of whom were domiciled in Philadelphia in the Commonwealth of Pennsylvania, and were citizens of Pennsylvania, and of Noah Sturtevant, who was domiciled in Boston and was a citizen of Massachusetts. The firm did business both in Philadelphia and Boston.

The following indenture was executed on the day of its date. [The substance of the indenture was a conveyance by N. Sturtevant & Company, and by each member of the firm, of all their property to Joseph A. Clay of Philadelphia, for the benefit of their creditors.]

It was agreed by the parties “that general assignments by debtors for the benefit of their creditors were recognized by the law of Pennsylvania at the time the assignment in this case was made, by an act of the Assembly of Pennsylvania of June 14, 1836; that by subsequent acts all preferences in such assignments, except for wages of labor to a limited amount, are avoided, and the assignments enure to the benefit of all the creditors equally, with the above exception, so far as the laws of Pennsylvania have force; that the assignment of October 25, 1861, to Clay, was general and without preferences, so far as the laws

¹ Followed in case of a lunatic residing abroad, though domiciled in England. *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666. — ED.

of Pennsylvania have force, and conformable to the laws of Pennsylvania; that Clay, the assignee, filed his first account November 17, 1863; that it was referred to John N. Campbell, a master, for audit and distribution; that claims of creditors were proved prior to April 14, 1864, to the amount of \$412,027.18; that Campbell filed his report on that day, and declared a dividend of $3\frac{1}{10}$ per cent, which has been paid as demanded; that on December 30, 1864, Campbell filed a supplementary report, admitting a claim of \$2,645.37, to a dividend, and some small claims were proved afterwards; that Clay subsequently filed his second account, exhibiting a balance of \$11,613.77, which, with some little accrued interest, will suffice for a further dividend of between two and three per cent; that there is an apparently hopeless claim against a bankrupt estate still outstanding, but nothing else recoverable by the assignee, unless the claim in the present case can be enforced; that by the laws of Pennsylvania creditors only recognize the assignment by proving their claims and accepting dividends, as they have done in this case to the extent above mentioned, and they have no remedy against the assigned property except this; and that no judgment or execution binds or can be levied on the estate after the assignment, and the assignment is valid against them in every way, so far as the laws of Pennsylvania have force."

Borrowscale, who was a citizen of Massachusetts, was employed by Clay, assignee, under the laws of Pennsylvania, of the firm of N. Sturtevant & Company, to collect certain amounts due that firm; and he did collect certain sums, of which he paid over part to Clay, and held the balance in his hands at the time when he was summoned as trustee.

The plaintiff was a citizen of Massachusetts, domiciled there at the time of the assignments to Clay and of the bringing of this suit, and also at the time of the making of the notes sued on, which were made and delivered in Massachusetts; and the plaintiff never proved his claim under the assignments to Clay, or in any manner recognized or assented to the said assignments, or to the action of Clay under the same, or to the doings of the other creditors in regard to said assignments. Noah Sturtevant died before this action was brought.

The Superior Court discharged the trustee, and the plaintiff appealed.

WELLS, J. The St. of 1836, c. 238, having been repealed, this case is not affected by any considerations arising from that statute, or from the general policy of the insolvent laws of Massachusetts. *National Mechanics' & Traders' Bank v. Eagle Sugar Refinery*, 109 Mass. 38.

Independently of those laws, it has always been held that voluntary assignments by a debtor, in trust for the payment of debts, and without other adequate consideration, are invalid as against attachment, except so far as assented to by the creditors for whose benefit they were made. If assented to by creditors, such assignments are good at common law, and will protect the property or fund from attachment to the extent of the amount due to creditors thus assenting; unless, by

the conditions of the assignment, it is made to take effect only upon the assent of all, or a prescribed number of creditors.

The assent of creditors will not be presumed on the ground that it is apparently for their interest; but must be shown by some form of adoption or affirmative acquiescence. *Russell v. Woodward*, 10 Pick. 408, 413.

In cases of assignment by a tripartite instrument, it is generally necessary that creditors should execute the instrument in order to give it full effect, because such is the intent with which it is made. But when this is not required by the form of the instrument of assignment, it is only necessary that creditors should give such assent to its provisions as will recognize and affirm the acceptance and possession of the property by the assignee, as made and held for their benefit and in their behalf, in accordance with the terms of the assignment. *Russell v. Woodward*, 10 Pick. 408; *Everett v. Walcott*, 15 Pick. 94.

If creditors present their claims to the trustees for allowance for the purpose of a distribution, in accordance with the terms of the assignment, they thereby assent to the trust; and the trustee thereafter holding the property in their behalf holds it upon a legal consideration, and his title is perfected. The effect is the same if they present their claims to commissioners or other persons appointed for that purpose, in accordance with the terms of the assignment. And it can make no difference, in this particular, if those persons are appointed under provisions of local public law, with reference to which the instrument of assignment was made.

The foregoing propositions meet and cover the present case. The assignment was made with reference to the laws of Pennsylvania. It is agreed that, by those laws, such an assignment is recognized as valid; and the proof and allowance of claims, and the distribution, are conducted as judicial proceedings. Creditors, to an amount largely exceeding the total assets, have presented and proved their claims and accepted dividends upon them, thereby signifying their adoption of the assignment for their benefit.

The question is made how far the courts of this Commonwealth are bound to recognize assignments of this kind, made in a foreign jurisdiction, when set up against our own citizens claiming to hold, by attachment, property of the insolvent debtor found within this jurisdiction.

Such assignments made by commissioners of bankruptcy, or by judicial or legislative authority merely, without the act and assent of the debtor, are not held as binding upon the courts of another State. *Taylor v. Columbian Ins. Co.*, 14 Allen, 353.

An assignment made by the debtor himself in another State, which, if made here, would be set aside for want of consideration or delivery, or as fraudulent, or contravening the policy of the law of this Commonwealth, will not be sustained here against an attachment, although valid in the State or country where made. *Zipcey v. Thompson*,

1 Gray, 243; Fall River Iron Works Co. v. Croade, 15 Pick. 11; Ingraham v. Geyer, 13 Mass. 146; Osborn v. Adams, 18 Pick. 245.

In each case above mentioned, to sustain the assignment would be to give force and effect here to the foreign law, which has none *suo vigore*. That is a matter of comity, and not of right. But in each case the assignment is always sustained so far as it affects property which was at the time within the jurisdiction where it was made: *Benedict v. Parmenter*, 13 Gray, 88; *Wales v. Alden*, 22 Pick. 245; and also as against all citizens of that jurisdiction, even when seeking a remedy here against property found here. *Rhode Island Central Bank v. Danforth*, 14 Gray, 123; *Martin v. Potter*, 11 Gray, 37; *Richardson v. Forepaugh*, 7 Gray, 546; *Whipple v. Thayer*, 16 Pick. 25; *Daniels v. Willard*, *Ib.* 36.

This assignment is made by the debtors themselves. No fraud is shown or suggested. It in no respect contravenes the policy of law as established in this Commonwealth. It is assented to by creditors sufficiently to give it a valid consideration and full legal effect, if it had been made here. The effect of that assent does not depend at all upon the judicial proceedings in Pennsylvania. Giving no force whatever to the judicial authority of those proceedings, or to the local law, we find in the acts of the parties sufficient to constitute a legal and valid assignment, which should be held to be good wherever made, and effectual to pass the rights of the debtors even to property not subject to the local laws of Pennsylvania. *Means v. Hapgood*, 19 Pick. 105; *Newman v. Bagley*, 16 Pick. 570. The judgment therefore must be

*Trustee discharged.*¹

BARNETT v. KINNEY.

SUPREME COURT OF THE UNITED STATES. 1893.

[Reported 147 *United States*, 476.]

APPEAL from the Supreme Court of the Territory of Idaho. Action of replevin to recover possession of certain goods and chattels. On November 23, 1887, one Lipman, a citizen of Utah, had conveyed the property in question, with other property in Utah, to Barnett, for the

¹ *Acc. J. M. Atherton Co. v. Ives*, 20 Fed. 894; *Schroder v. Tompkins*, 58 Fed. 672; *Campbell v. Colorado C. & I. Co.*, 9 Col. 60, 10 Pac. 248; *First Nat. Bank v. Walker*, 61 Conn. 154, 23 Atl. 696; *Walters v. Whitlock*, 9 Fla. 86; *Princeton Mfg. Co. v. White*, 68 Ga. 96; *Coffin v. Kelling*, 83 Ky. 649; *In re Paige & Sexsmith Lumber Co.*, 31 Minn. 136, 16 N. W. 700; *Toof v. Miller*, 73 Miss. 756, 19 So. 577; *Askew v. La Cygne Bank*, 83 Mo. 366; *Frazer v. Fredericks*, 24 N. J. L. 162; *Ockerman v. Cross*, 54 N. Y. 29; *Johnson v. Sharp*, 31 Oh. S. 611; *Smith's Appeal*, 104 Pa. 381; *Noble v. Smith*, 6 R. I. 446; *Weider v. Maddox*, 66 Tex. 372, 1 S. W. 168; *Gregg v. Sloan*, 76 Va. 497; *Harrison v. Farmers' Bank*, 9 W. Va. 424; *Cook v. Van Horn*, 81 Wis. 291, 50 N. W. 893. — ED.

benefit of the creditors of Lipman, with preferences to certain creditors. On November 25, 1887, Barnett, as assignee, took actual possession of the personal property situated in Idaho, and on November 26, and before the property was taken by Kinney, filed the assignment for record in the proper office. Kinney had actual notice. The assignment was valid by the laws of Utah. Lipman was indebted to the St. Paul Knitting Works, a corporation organized under the laws of Minnesota, and on November 26, 1887, while Barnett was in actual possession, Kinney, who was sheriff of the county, under a writ of attachment in favor of that corporation and against Lipman, took possession of the property; and thereupon this action of replevin was commenced and the possession of the property delivered to Barnett, who had sold the same and retained the proceeds subject to the final disposition of the action. Judgment was given in the territorial court in favor of the defendant, and the case was brought by appeal to this court.¹

FULLER, C. J. The Supreme Court of the Territory held that a non-resident could not make an assignment, with preferences, of personal property situated in Idaho, that would be valid as against a non-resident attaching creditor, the latter being entitled to the same rights as a citizen of Idaho; that the recognition by one State of the laws of another State governing the transfer of property rested on the principle of comity, which always yielded when the policy of the State where the property was located had prescribed a different rule of transfer from that of the domicil of the owner; that this assignment was contrary to the statutes and the settled policy of Idaho, in that it provided for preferences; that the fact that the assignee had taken and was in possession of the property could not affect the result; and that the distinction between a voluntary and an involuntary assignment was entitled to no consideration.

Undoubtedly there is some conflict of authority on the question as to how far the transfer of personal property by assignment or sale, lawfully made in the country of the domicil of the owner, will be held to be valid in the courts of another country, where the property is situated and a different local rule prevails.

We had occasion to consider this subject somewhat in *Cole v. Cunningham*, 133 U. S. 107, 129, and it was there said: "Great contrariety of State decision exists upon this general topic, and it may be fairly stated that, as between citizens of the State of the forum, and the assignee appointed under the laws of another State, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own State and the State of the debtor, the laws of such State will ordinarily be applied in the State of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter. Again, although, in some of the States, the fact that the assignee claims under a decree of a court

¹ This statement is condensed from the opinion of Mr. Chief Justice FULLER. — ED.

or by virtue of the law of the State of the domicile of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial, yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the State in which the law was passed. This is a reason which applies to citizens of the actual situs of the property when that is elsewhere than at the domicile of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance."

We have here a voluntary transfer of his property by a citizen of Utah for the payment of his debts, with preferences, which transfer was valid in Utah, where made, and was consummated by the delivery of the property in Idaho, where it was situated, and then taken on an attachment in favor of a creditor not a resident or citizen of Idaho. Was there anything in the statutes or established policy of Idaho invalidating such transfer ?

Title XII of Part Second of the Revised Statutes of the Territory of Idaho, entitled "Of proceedings in insolvency" (Rev. Stats. Idaho, §§ 5875 to 5932), provided that "no assignment of any insolvent debtor, otherwise than as provided in this title, is legal or binding on creditors ;" that creditors should share *pro rata*, "without priority or preference whatever ;" for the discharge of the insolvent debtor upon compliance with the provisions of the title, by application for such discharge by petition to the District Court of the county in which he had resided for six months next preceding, with schedule and inventory annexed, giving a true statement of debts and liabilities and a description of all the insolvent's estate, including his homestead, if any, and all property exempt by law from execution. The act applied to corporations and partnerships, and declared that if the partners resided in different counties, that court in which the petition was first filed should retain jurisdiction over the case. Nothing is clearer from its various provisions than that the statute had reference only to domestic insolvents. As pointed out by Judge Berry in his dissenting opinion, the first section of the fifty-eight upon this subject, in providing that "every insolvent debtor may, upon compliance with the provisions of this title, be discharged from his debts and liabilities," demonstrates this. The legislature of Idaho certainly did not attempt to discharge citizens of other jurisdictions from their liabilities, nor intend that personal property in Idaho, belonging to citizens of other States or Territories, could not be applied to the payment of their debts unless they acquired a six months' residence in some county of Idaho, and went through its insolvency court.

The instrument in controversy did not purport to be executed under any statute, but was an ordinary common law assignment with preferences, and as such was not, in itself, illegal. *Jewell v. Knight*, 123 U. S. 426, 434. And it was found as a fact that it was valid under the laws of Utah. While the statute of Idaho prescribed pro rata distribution without preference, in assignments under the statute, it did not otherwise deal with the disposition of his property by a debtor nor prohibit preferences between non-resident debtors and creditors through an assignment valid by the laws of the debtor's domicile. No just rule required the courts of Idaho, at the instance of a citizen of another State, to adjudge a transfer, valid at common law and by the law of the place where it was made, to be invalid, because preferring creditors elsewhere, and, therefore, in contravention of the Idaho statute and the public policy therein indicated in respect of its own citizens, proceeding thereunder. The law of the situs was not incompatible with the law of the domicile.

In *Halsted v. Straus*, 32 Fed. Rep. 279, 280, which was an action in New Jersey involving an attachment there by a New York creditor as against the voluntary assignee of a New York firm, the property in dispute being an indebtedness of one Straus, a resident of New Jersey, to the firm, Mr. Justice Bradley remarked: "It is true that the statute of New Jersey declares that assignments in trust for the benefit of creditors shall be for their equal benefit, in proportion to their several demands, and that all preferences shall be deemed fraudulent and void. But this law applies only to New Jersey assignments, and not to those made in other States, which affect property or creditors in New Jersey. It has been distinctly held by the courts of New Jersey that a voluntary assignment made by a non-resident debtor, which is valid by the law of the place where made, cannot be impeached in New Jersey, with regard to property situated there, by non-resident debtors. *Bentley v. Whittemore*, 4. C. E. Greene (19 N. J. Eq.), 462; *Moore v. Bonnell*, 2 Vroom (31 N. J. Law), 90. The execution of foreign assignments in New Jersey will be enforced by its courts as a matter of comity, except when it would injure its own citizens; then it will not. If *Deering, Milliken & Co.* were a New Jersey firm they could successfully resist the execution of the assignment in this case. But they are not; they are a New York firm. New York is their business residence and domicile. The mere fact that one of the partners resides in New Jersey cannot alter the case. The New Jersey courts, in carrying out the policy of its statute for the protection of its citizens, by refusing to carry into effect a valid foreign assignment, will be governed by reasonable rules of general jurisprudence; and it seems to me that to refuse validity to the assignment in the present case, would be unreasonable and uncalled for."

In *May v. First National Bank*, 122 Ill. 551, 556, the Supreme Court of Illinois held that the provision in the statute of that State prohibiting all preferences in assignments by debtors applied only to those

made in the State, and not to those made in other States; that the statute concerned only domestic assignments and domestic creditors; and the court, in reference to the contention that, if not against the terms, the assignment was against the policy of the statute, said: "An assignment giving preferences, though made without the State, might as against creditors residing in this State, with some reason, be claimed to be invalid, as being against the policy of the statute in respect of domestic creditors — that it was the policy of the law that there should be an equal distribution in respect to them. But as the statute has no application to assignments made without the State, we cannot see that there is any policy of the law which can be said to exist with respect to such assignments, or with respect to foreign creditors, and why non-residents are not left free to execute voluntary assignments, with or without preferences, among foreign creditors, as they may see fit, so long as domestic creditors are not affected thereby, without objection lying to such assignments that they are against the policy of our law. The statute was not made for the regulation of foreign assignments, or for the distribution, under such assignments, of a debtor's property among foreign creditors."

In *Frank v. Bobbitt*, 155 Mass. 112, a voluntary assignment made in North Carolina and valid there, was held valid and enforced in Massachusetts as against a subsequent attaching creditor of the assignors, resident in still another State, and not a party to the assignment. The Supreme Judicial Court observed that the assignment was a voluntary and not a statutory one; that the attaching creditors were not resident in Massachusetts; that at common law in that State an assignment for the benefit of creditors which created preferences was not void for that reason; and that there was no statute which rendered invalid such an assignment when made by parties living in another State, and affecting property in Massachusetts, citing *Train v. Kendall*, 137 Mass. 366. Referring to the general rule that a contract, valid by the law of the place where made, would be regarded as valid elsewhere, and stating that "it is not necessary to inquire whether this rule rests on the comity which prevails between different States and countries, or is a recognition of the general right which every one has to dispose of his property or to contract concerning it as he chooses," the court said that the only qualification annexed to voluntary assignments made by debtors living in another State had been "that this court would not sustain them if to do so would be prejudicial to the interests of our own citizens or opposed to public policy." And added: "As to the claim of the plaintiffs that they should stand as well as if they were citizens of this State, it may be said, in the first place, that the qualification attached to foreign assignments is in favor of our own citizens as such, and in the next place, that the assignment being valid by the law of the place where it was made, and not adverse to the interests of our citizens, nor opposed to public policy, no cause appears for pronouncing it invalid." And see, among numerous cases to the same effect, *Butler v. Wendell*,

57 Mich. 62; Receiver v. First National Bank, 7 Stew. (34 N. J. Eq.) 450; Egbert v. Baker, 58 Conn. 319; Chafee v. Fourth National Bank of New York, 71 Me. 514; Ockerman v. Cross, 54 N. Y. 29; Weider v. Maddox, 86 Tex. 372; Thurston v. Rosenfield, 42 Mo. 474.

We do not regard our decision in Green v. Van Buskirk, 5 Wall. 307, 7 Wall. 139, as to the contrary. That case was fully considered in Cole v. Cunningham, *supra*, and need not be re-examined. The controversy was between two creditors of the owner of personalty in Illinois, one of them having obtained judgment in a suit in which the property was attached and the other claiming under a chattel mortgage. By the Illinois statute such a mortgage was void as against third persons, unless acknowledged and recorded as provided, or unless the property was delivered to and remained with the mortgagee, and the mortgage in that case was not acknowledged and recorded, nor had possession been taken. All parties were citizens of New York, but that fact was not considered sufficient to overcome the distinctively politic and coercive law of Illinois.

In our judgment, the Idaho statute was inapplicable and the assignment was in contravention of no settled policy of that Territory. It was valid at common law, and valid in Utah, and the assignee having taken possession before the attachment issued, the District Court was right in the conclusions of law at which it arrived.

The judgment is reversed and the cause remanded to the Supreme Court of the State of Idaho for further proceedings not inconsistent with this opinion.

*Judgment reversed.*¹

GUILLANDER v. HOWELL.

COURT OF APPEALS, NEW YORK. 1866.

[Reported 35 New York, 657.]

ACTION for the detention and conversion of some boilers. A firm of Boardman & Co., residing and doing business in the city of New York, failed in December, 1857, and then in that city made a general assignment to the plaintiff, then a resident of said city, for the benefit of their creditors, giving preferences. The assignors then had some steam boilers in New Jersey, which had been manufactured for them by the defendants, and for which they were then indebted to the defendants. After the assignment, the defendants, residents of New Jersey, sold

¹ Acc. Train v. Kendall, 137 Mass. 366 (but see Zipcey v. Thompson, 1 Gray 243); Frank v. Bobbitt, 155 Mass. 112, 29 N. E. 209; Butler v. Wendell, 57 Mich. 62, 23 N. W. 460; Williams v. Kemper, Hundley & McDonald D. G. Co., 4 Okl. 145, 43 Pac. 1148; Smith's Appeal, 117 Pa. 30, 11 Atl. 394. — Ed.

the steam boilers under proceedings commenced by foreign attachment against the assignors in New Jersey to satisfy said demand. Plaintiff demanded the boilers and defendants refused to deliver them. It appeared on the trial that an assignment giving preferences was void in New Jersey by the laws of that State. Verdict for defendants, affirmed at the General Term of the Supreme Court in the First District, and the plaintiff appeals.

PECKHAM, J. The point is here distinctly presented, and it is the only point in the case, whether a sale in New York, legal there, of chattels situate in New Jersey is valid in the latter State as against creditors of the assignors residing there, when it is void by the laws thereof.

It is a general rule in regard to personal property, that it has no situs, but follows the person of the owner. It is, therefore, governed in its transfer and disposition by the law of the domicile of its owner, that is, by the law of the place where the sale is made, without regard to the law of the locality where it may be actually situated, so that if a sale be valid where made, it is valid everywhere. Story's *Conf. of Laws*, §§ 379, 383, 384, &c.; *Warren v. Van Buskirk*, 13 Abbott's Pr. R., affirmed in this court in December, 1865; opinion by Justice Potter. If that be the universal rule, the plaintiff in the case is of course entitled to recover.

But certain exceptions are stated in the books, which seem to be as well sustained as the rule itself. One exception is that such sale is not valid in another State, where the property is in fact situate, if it conflict with the interests of that State or its citizens.

Huberus lays down three maxims in reference to the transfer of property, and the effect of such transfer under different governments. 1. "The laws of every empire have force within the limits of that government, and are obligatory upon all within its bounds. 2. All persons within the limits of a government are considered as subjects, whether their residence is permanent or temporary. 3. By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of the other government or their citizens." Quoted in a note to 3 Dallas, 370.

Justice Cowen, when reporter, regarded the rule settled by the cases to be, "that the law of a place, where the contract is made or to be performed, is to govern as to the nature, validity, construction, and effect of such contract, and, being valid in such place, it is to be considered valid and enforced everywhere, with the exception of cases in which the contract is immoral or unjust, or in which the enforcing it in a State would be injurious to the rights, the interest, or convenience of such State or its citizens," and cites many cases. *Andrews v. Herriot*, 4 Cow. 510., in note at 511.

Judge Story, after stating that personal property, by the law of England, has no locality, but must be governed by the law of the

domicil of its owner (Story's Conf. Laws, §§ 330, 331), and that foreign jurists, whom he cites, affirm the same doctrine, states the exception to the rule substantially as before expressed, as adjudged in different States in this country, and adds: "No one can seriously doubt that it is competent for any State to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its own territorial limits; nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or a selfish policy." *Id.* § 390.

What is injurious to the rights of the citizens where the property is situate, should be the subject of positive legislation, and not left to the discretion of the courts (*id.* § 390), and so are the authorities generally, in the several States, although the rule is sometimes more broadly expressed. *Zipcey v. Thompson*, 1 Gray [Mass.], 243; *Varnum v. Camp*, 1 Green [N. J.], 326; *Ingraham v. Geyer*, 13 Mass. 145; *Le Roy v. Crowninshield*, 2 Mason, 157; *Fox v. Adams*, 5 Greenl. [Me.] 245; *Oliver v. Townes*, 14 Martin [La], 97; 2 Cond. R. S. C. [La.] 606. A well considered case. So in Virginia and Kentucky (says Chancellor Kent), under their statute laws, all real and personal property within the State are held to be bound by the attachment laws of the State, though the owner should execute an instrument in control of it at his domicil abroad. The rule of courtesy is held to be overruled by positive law." 2 Kent, 407; *Bishop v. Holcomb*, 10 Conn. 444. Such, I believe, is the rule of law in all of the States where the point has been adjudicated, except, perhaps, South Carolina. The case referred to, as an authority in South Carolina, of *Green v. Mowry* (2 Bailey, 163), I have not been able to find, except a statement of its decision, in a note in 2 Kent, 408. Whether it applied to movables or to a chose in action is not stated.

The exception is fully recognized by Lord Loughborough, in *Sill v. Warwick* (1 H. Bl. at 693), and by the reporter in giving the course of reasoning of the judges in the exchequer chamber in *Philips v. Hunter* (2 H. Bl. at p. 405).

The two last were cases under the bankrupt laws, which it is now generally held in this country do not operate extraterritorially. But in the case at bar, it is a question of a conflict of laws. By the law of New York the sale is valid, by that of New Jersey it is void as to creditors. The law of this State is of course invalid as a mere law in New Jersey. It cannot operate there except by comity or courtesy, and as to property actually situate in New Jersey, that State has the conceded right to legislate; she may declare what alone shall transfer the title as against her citizens, creditors of the assignor. The property is within her exclusive jurisdiction: she protects and regulates it; though we may differ as to the policy or principles of her laws, we must admit their validity. In all the books it is conceded that real property must be transferred according to the law

of its locality, because it is subject to the exclusive jurisdiction of the government of its locality, and because every legal remedy in regard to it must be sought there. This is not a case of priority of title, but of conflicting title. The law of New York holds this sale valid, as to all property which her laws can regulate. Her laws are of no force in New Jersey as laws, but by comity they are enforced as to a transfer of personal property valid here, except when injurious to her citizens there. There is not a decision in this State against this position, although there are some general dicta that would permit a different construction.

If the fact accorded with the fiction and the property were, in fact, within the State when the assignment was made, the title would pass, and it would not be liable to foreign attachment, though afterward found in New Jersey.

This court, in *Warren v. Van Buskirk*, *supra*, has held that this action would lie, if the defendants had been residents of our State when the assignment was made, and, therefore, subject to its laws. So are the decisions generally in other States. (*Bullock v. Taylor*, 16 Pick, 336.)

The Supreme Court in the Third District at General Term, lately held that the exception did not extend to a debt due from a resident in Connecticut to a resident of this State—but that an assignment thereof valid here, though invalid there by her laws, ought to be held valid there also, even as against residents of Connecticut—because a debt is not a *corpus* capable of local position, but merely a *jus incorporate*. *Thurman v. Stockwell*, decided in 1865.

This is sustained by two other decisions of precisely the same character. In *Speed v. May* (17 Penn. State, 91) it was held that an assignment of a chose in action, due from a resident of Pennsylvania, legally made in Maryland, was valid in Pennsylvania, although the general assignment, which included the claim, was not recorded as required by the law of the latter State.

So in *Caskie v. Webster* (2 Wal. Jr. 131), Mr. Justice Grier made a like decision. *Thurman v. Stockwell* made a distinction between debts and movables.

In *Caskie v. Webster*, assignee, the judge remarked: "A debt is a mere incorporeal right. It has no situs and follows the person of the owner." But he did not base his decision on that distinction. In a very brief opinion, he seemed impliedly to admit that the law was against his decision as to personal property as between different nations, but he did "not think that the different States of this Union are to be regarded as a general thing in the relation of States foreign to each other." With deference, I think the doctrine on this subject to be well established the other way. See cases before cited, and *Hoyt v. Thompson*, 19 N. Y. 602; *Leinman v. The People*, 20 N. Y. 602.

This court has recognized the distinction as to a situs between debts and movables. The latter being capable of having a situs, not the former, as they follow the domicile of the owner. *People v. Commissioners of Taxes*, 23 N. Y. 224.

It is insisted that great embarrassment will occur if a transfer of movables must be made according to the law of its situs, as it is not expected that persons will know the laws of a foreign country. This difficulty is rather imaginary than real. The transfer is always held valid for all general purposes, with the exception before stated. There would seem to be no great injustice in holding that movables in one State, which have probably been a ground of their owners obtaining credit there, should not be transferred to another State to pay foreign debts, leaving local debts unpaid, unless it be done in accordance with the law of their locality.

I know of no decisions anywhere that would sustain this action. The cases before cited of *Thurman v. Stockwell*, *Speed v. May*, and *Caskie v. Webster*, are, I think, sound law. A chose in action cannot surely be said to have any actual situs in the place where the debtor resides — as a general principle it is payable at the residence of the creditor, if not expressed otherwise, and a tender to be good must be made to the creditor. There would seem, therefore, to be no sound basis for the debtor's State, to legislate exclusively as to the legality of a transfer of that debt, made by a foreign creditor. In such case, as in all others, where the property transferred does not actually lie within the jurisdiction of another government, a sale or a contract, valid where made, is valid everywhere.¹

The exception that the contract cannot be enforced if it be immoral or unjust, will and should be rarely, if ever, heeded between civilized nations.

Every civilized nation should be the sole and exclusive judge of what is moral and just in her legislation upon matters conceded to be within her exclusive jurisdiction.

This State has forbidden the taking of more than at the rate of seven per cent interest by the severest penalties. Lotteries, though once allowed for literary or religious purposes, are now declared a nuisance. So of slavery, once sustained but now prohibited in every State in the Union. Yet, a note given for slaves or lottery tickets, or usurious by our law, if made here, if valid by the laws of the country where made and payable, would be sustained here.

It would, I admit, be more harmonious with the general principle that personal property has no situs, and practically, perhaps, more convenient to hold that a sale of movables, valid where made, should be valid everywhere.

¹ *Acc. Caskie v. Webster*, 2 Wall. Jr. 131; *Egbert v. Baker*, 58 Conn. 319, 20 Atl. 466; *Birdseye v. Baker*, 82 Ga. 142, 7 S. E. 863. *In re Dalpay*, 41 Minn. 532, 43 N. W. 564. *Contra*, *Kimball v. Plant*, 14 La. 10; *Zipcey v. Thompson*, 1 Gray, 243; *Martin v. Potter*, 34 Vt. 87. — Ed.

But, in addition to the objections thereto already stated, suppose the laws of the States differ, as they sometimes do, as to what is personal and what is real property, could it be pretended that a sale here without deed of what our law calls personal, and the law of New Jersey declares to be real estate actually located there, would pass the title to the property there ?

Whatever may be our views as to what the law ought to be in cases like the one at bar, the decisions harmonizing, too, with elementary writers, are too uniform and too numerous to warrant us in overruling them. Should we do so and hold the defendant responsible in this case, we should be in antagonism with nearly every State in the Union — if not with all, upon a question, too, which each State has the right to decide for itself and generally to enforce its decision, and as a general thing our decision the other way would remain a lifeless rule, without our having the least power to enforce it.

We think the judgment should be affirmed.

DAVIES, Ch. J., and PORTER, J., dissented ; all the other judges concurring.

*Judgment affirmed.*¹

WHIPPLE *v.* THAYER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1834.

[Reported 16 *Pickering*, 25.]

THIS was an action of replevin, brought by the plaintiff, as the assignee of David Wilkinson, against the defendant, who was a deputy sheriff.

By an agreed statement of facts it appeared that on July 20, 1829, the property in question, consisting of fifteen bales of cotton of the value of \$550, and being then on its way from Providence in Rhode Island, to Wilkinson's factory at Wilkinsonville, in this Commonwealth, was attached on board of a canal boat and detained by the defendant, on a writ in favor of one Beckwith against Wilkinson ; that by this

¹ *Acc.* *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487 ; *Stricker v. Tinkham*, 35 Ga. 176 ; *In re Dalpay*, 41 Minn. 532, 43 N. W. 564.

So generally, though an assignment of personal property for the benefit of creditors is valid by the law of the place of assignment and of the domicile of the assignor, it will not prevail against subsequent attachment by the assignor's creditors of personal property situated at the time of the assignment in a State by the laws of which the assignment was for any reason invalid. *King v. Johnson*, 5 Harr. (Del.) 31 ; *Kansas City Packing Co. v. Hoover*, 1 App. D. C. 268 ; *Woolson v. Pipher*, 100 Ind. 306 ; *Franzen v. Hutchinson*, 94 Ia. 95, 62 N. W. 690 ; *Brown v. Knox*, 6 Mo. 302 ; *Varnum v. Camp*, 13 N. J. L. 326 ; *Pierce v. O'Brien*, 129 Mass. 314 ; *Rice v. Courtis*, 32 Vt. 460. But see *Livermore v. Jenckes*, 21 How. 126 ; *Speed v. May*, 17 Pa. 91 ; *Crampton v. Valido Marble Co.*, 60 Vt. 291. — Ed.

writ, the defendant was directed to attach to the value of \$600; that on the 23d day of the same July, Wilkinson, by two several bipartite instruments, assigned all his property, real and personal, to the plaintiff, in trust for the benefit of his creditors, but that the creditors did not signify their assent to the assignment by becoming parties to it; that on August 1, 1829, the defendant returned the cotton as again attached, (subject to the first attachment,) at the suit of Harkness & Stead against Hezekiah Howe and Wilkinson, who were partners; that the claim of Harkness & Stead amounted to the sum of \$30, and the defendant was directed to attach to the amount of \$60; that the defendant knew of the failure of Wilkinson previously to the second attachment, but had no knowledge of the assignment except from common report; that at the time of the first attachment and of the assignment, the cotton was the sole property of Wilkinson; that in the interim between these attachments, the plaintiff agreed verbally to settle the demand of Beckwith, but did not actually pay the same until after the second attachment; that the defendant was informed of this agreement, but was in no other way discharged from his responsibility; that on the 12th day of the same August, the plaintiff having paid the claim of Beckwith, demanded the cotton of the defendant, who refused to deliver the same; and that thereupon this action was commenced.

It further appeared that Wilkinson was insolvent, not having property sufficient to pay his private debts; that his property was in several different States of the Union; that the plaintiff took possession thereof as soon as he conveniently could; but that he took no other possession of the cotton in question, than such as resulted from the facts above stated.

Howe was a citizen of this Commonwealth. The plaintiff, Wilkinson, Harkness, and Stead, were all citizens of Rhode Island; and by the laws of that State, the assignment of Wilkinson vested the property in his assignee, so that it could not be attached by his creditors.

If, upon these facts, the action could be maintained, the plaintiff was to have his costs; otherwise, judgment was to be entered for the defendant.¹

SHAW, C. J. The only objection made to the assignment relied on by the plaintiff is, that it was a trust assignment by an insolvent debtor, providing for a distribution of his property among his creditors, and it not appearing that the creditors had signified their assent by becoming parties to it, by the laws of our own State it is not to be considered valid against an attaching creditor. Without at present deciding the more general question, whether this assignment, made by the owner of property, in a mode conformable to the laws of the place of his domicile, would be good against a subsequent attachment, made by a citizen of this State, the court are all of opinion that as against a citizen of Rhode Island, the assignment was good, and therefore, that the de-

¹ Arguments of counsel, and part of the opinion, in which the necessity of possession by the assignee was discussed, are omitted. — ED.

fendant could not justify his refusal to deliver the goods to the plaintiff, the assignee under his attachment in behalf of Harkness & Stead, citizens of Rhode Island, and that the plaintiff is entitled to hold the goods.¹

HEYER v. ALEXANDER.

SUPREME COURT OF ILLINOIS. 1884.

[*Reported* 108 *Illinois*, 385.]

WALKER, J.² Defendants in error brought an action of assumpsit in the St. Clair Circuit Court against Ottomar W. Heyer, who resided in Missouri, and also sued out a writ of attachment in aid. On the 2d of December, 1882, the writ was levied on a piece of ground in East St. Louis, on which defendant had a lease for ten years. On this piece of ground defendant had a glucose factory, and, connected with it, material and other personal property. On the next day the writ was also levied on a portion of this personal property in the factory building, but it was not removed from the building. On the 28th day of November, Dank Brothers & Co. had caused an attachment against Heyer to be levied on this lot and a portion of the personal property, and a custodian was placed in possession of the property in the building, and it was not removed therefrom. On the 29th of November, Heyer made an assignment of his property for the benefit of his creditors. The assignment was made in Missouri, under the laws of that State, and it is not denied that it conformed to the requirements of those laws. It was recorded in St. Louis, and on the 3d of December following it was recorded in St. Clair County, in this State. The trust deed purports to convey the grantor's right, title, and interest "in and to all of the real estate, lands, tenements, personalty, goods, chattels, moneys, choses in action, accounts, notes, property of every kind, nature, and description whatever, and wherever situated," excepting property exempt from execution under the laws of Missouri. On the 29th of November the assignee, Muench, appointed P. B. Fenske agent, to

¹ *Acc. Matthews v. Lloyd*, 89 Ky. 625, 13 S. W. 106; *Richardson v. Leavitt*, 1 La. Ann. 430 (see *Beirne v. Patton*, 17 La. 589); *Pomroy v. Lyman*, 10 All. 468 (see *Faulkner v. Hyman*, 142 Mass. 53); *Hoag v. Hunt*, 21 N. H. 106; *Moore v. Bonnell*, 31 N. J. L. 90; *Hunt v. Lathrop*, 7 R. I. 58; *contra*, *Sheldon v. Blauvelt*, 29 S. C. 453, 7 S. E. 593. So the assignor or a creditor who has assented to the assignment cannot claim the property as against the assignee. *Perley v. Mason*, 64 N. H. 6, 3 Atl. 629; *Thompson v. Fry*, 51 Hun, 296, 4 N. Y. Supp. 166; *Teetor v. Robinson*, 7 S. & R. 182.

The New Hampshire doctrine may be found in *Sanderson v. Bradford*, 10 N. H. 260; *Hall v. Boardman*, 14 N. H. 38; *Carbee v. Mason*, 64 N. H. 10, 4 Atl. 791. — Ed.

² Part of the opinion is omitted. — Ed.

take possession for him of all of Heyer's property in this State. This appointment was in writing. He, on the same day, wrote to the sheriff of St. Clair County, notifying him that he had been appointed assignee, and the notice was received by the sheriff before the levy was made by him on the 2d of December. Fenske, on the 29th of November, went to the factory in East St. Louis, and employed Bauer, Heyer's superintendent, to keep the factory and property for Muench until further orders. The custodian placed in charge of the property on the 28th of November remained in charge of the property, and Bauer claimed possession of the property after the 29th of the month. It is claimed that Taussig, one of the plaintiffs in the attachment, who levied on the leasehold interest on the 2d, and the personal property on the 3d, of December, had notice of the assignment before suing out the writ of attachment. The first levy, under the Dank attachment, only embraced a part of the personal property. Soon after the levy the sheriff sold a part of the property levied on, as perishable, and on the 5th of January, 1882, the balance was sold, under an order of the St. Louis Circuit Court, and the sale was approved. The purchaser sold the property to the St. Louis Syrup, Glucose and Grape Sugar Company. Muench, the trustee, and that company, filed interpleaders, each claiming all the property levied on, and issues were formed. The interpleaders moved the court for a separate trial, but the court denied the motion. A trial was had by the court without a jury, by consent, and the court found the property subject to the attachment. This was at the February term. Motions for a new trial were entered, which were overruled at the May term, and a personal judgment was rendered in favor of plaintiff for \$902.56, against defendant, with an order for a special execution for the sale of the real estate levied on under the attachment, but no order was made as to the personal property.

The court refused to hold the following propositions, asked by the interpleaders, to be the law in the case: —

“On behalf of the interpleaders the court is requested to declare the law to be, that the deed of assignment from Ottomar W. Heyer to Hugo Muench, introduced in evidence, was sufficient to convey to said Muench any real estate, or any interest therein, situate in the State of Illinois, belonging to said Heyer.

“The court is further requested, on behalf of said interpleaders, to declare the law to be, that said deed of assignment from Heyer to Muench was sufficient, if actual possession was taken under it of the real estate involved, before the rights of others attached, to convey to said Muench any real estate, or any interest therein, of said Heyer, situate in the State of Illinois, so as to enable said Muench, or his grantee or grantees, to hold the same against a subsequent attaching creditor having notice of said conveyance.

“The court is further requested, on behalf of said interpleaders, to declare the law to be, that the words of general description contained in said deed from Heyer to Muench were sufficient to convey real

estate, or any interest therein, of said Heyer, situate in the State of Illinois, if the conveyance was otherwise valid."

Plaintiffs in error removed the case on error to the Appellate Court for the Fourth District. On a trial in that court the judgment of the Circuit Court was affirmed, and the case comes to this court, on a certificate under the statute, on error from that court.

Plaintiffs in error urge a reversal on the grounds that the Appellate Court erred in holding that the language of the deed of trust was not sufficient to pass title to property of the grantor situated in this State, as against creditors residing therein; in not reversing because the Circuit Court refused separate trials to the interpleaders; in not making an order disposing of the personal property levied on under the attachment; and in finding the amount due to, and rendering judgment in favor of, defendants in error, at the May term, when the issues were found at the February term. We shall consider the errors in the inverse order of their assignment. . . .

We now come to the consideration of the important and controlling question in the case, — that is, whether the deed of assignment was operative to pass the title to the property as against creditors in this State. It is obvious that neither the statute of Missouri nor a judgment of a court in that State can in the least affect the title or possession of property beyond its territorial limits. We consider that as the settled law beyond all dispute. But the owner of real property in this State, although a citizen of another State, may, under our statute, convey it by conforming to its requirements in the execution of the deed of conveyance.

We shall now consider the question whether the deed of trust operated to pass the title to this leasehold estate beyond the reach of the attachment of the domestic creditors.

There seems to be some confusion growing out of the fact that no distinction is made, in some cases, between assignments made by decree of court and a conveyance by the owner in trust for specified purposes, as, for the payment of his debts. A decree of court appointing an assignee to administer the debtor's property for the benefit of his creditors, whatever its effect in the State where it is rendered, has no extraterritorial effect on the debtor's real estate in another or foreign jurisdiction. But this is not true of conveyances of real estate lying in a different State from the residence of the owner. In all the States of the Union their laws authorize non-residents to convey real estate by conforming to the requirements of their laws. Thus it is seen there is a broad distinction between a foreign decree and a conveyance by a non-resident. Neither a statute nor decree of another State can directly affect titles to land in this State. No doubt a court of chancery may require an owner of lands in a different State to convey them to a person entitled in equity to the property, and when so conveyed, if the laws of the State where the lands are situated are observed, the title would pass. It would, in this case, seem to be clear that the

leasehold estate passed by this deed of assignment, subject to such restrictions as our laws may impose. But after so conveying this estate the grantor declared a trust. The question is, will our laws permit that trust to be unconditionally enforced as against his creditors resident in this State? This conveyance is only valid by the comity between the States, and the same comity in some cases imposes terms upon the conveyance for the protection of the inhabitants of the State where the property to be affected is situated. In some of the States it has been held that a deed of assignment by a non-resident debtor to a trustee for payment of debts will not be enforced against creditors residing in the State where the land is situated. In the case of *Chafee v. Fourth National Bank*, 71 Me. 514, it was held, "that an assignment made by an insolvent debtor in another jurisdiction will not operate upon property in this State so as to defeat the attachment of a creditor residing here. . . . Comity between States is not thus to be extended to the prejudice of our own citizens." The doctrine is that such a conveyance is subject to the claims of resident creditors where the property is located. This we regard as the true rule. It is not just or fair that creditors in this State should be compelled to go to a foreign State to receive a *pro rata* share of the debtor's property, when they perhaps extended credit alone upon the faith of the debtor's property in this State, and to which they looked for payment.

The recognized law, well settled and of uniform application, in reference to the administration of estates, is, that where a foreign administrator or executor takes out new or ancillary letters in another country, the creditors residing in such country must be first paid. . . .

This is the principle that the comity between the States requires that administration be granted to the foreign administrator on the implied condition that the creditors of the State where the property is found shall be first paid from the assets of the foreign deceased debtor. In analogy to this doctrine, a foreign debtor cannot place his property in trust so as to defeat his creditors in the State in which this property is situated. We are not prepared to hold, nor do we decide, that this doctrine applies to any conveyance except an assignment by a debtor for the benefit of his creditors. That is the question presented in this case, and we decide it alone. That the States have the right to discriminate in favor of domestic creditors, and against foreign creditors, was fully recognized by the framers of the federal constitution, and the recognition of the principle was one of the grounds for providing for a general bankrupt act. Had there been such a law in force, no such assignment could have been made.

This case is unlike the case of *Chicago, Milwaukee and St. Paul Ry. Co. v. Keokuk Northern Line Packet Co.*, 108 Ill. 317. In that case the property was personalty, that passed on its sale by delivery, and situated in Missouri, where the receiver was appointed, and the title vested in him by his appointment, and the property was brought temporarily into this State, without any intention of its remaining

permanently. But in this case the property was permanently located in this State, and is still here. It was here when the conveyance was made. In this there is a broad and marked distinction between the two cases. The Circuit Court therefore did not err in refusing to hold the propositions asked by the interpleaders, as the law governing this case.

It is urged that appellee had notice of the deed of assignment before he commenced this suit, or such notice as put him on inquiry. We are precluded by statute from reviewing contraverted facts in cases coming here from the Appellate Court. That was a controverted fact, and the Appellate Court has conclusively determined it, and it is beyond our power to review that fact. But that question is immaterial to this decision.

Perceiving no error in the record, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*¹

MEAD v. DAYTON.

SUPREME COURT OF ERRORS, CONNECTICUT. 1859.

[Reported 28 Connecticut, 33.]

TROVER. The plaintiff claimed title to the property in question as the trustee in insolvency of one Joshua Sands. The defendant claimed title under a purchase from the insolvent, a short time before his assignment in insolvency.²

ELLSWORTH, J. Several questions have been made in this case which we need not at length consider; for the main one, if decided for the defendant, as we think it must be, is decisive of the case, and must be fatal to the title of the plaintiff as assignee of Joshua Sands.

On the 19th day of October, 1857, the defendant, a resident of the State of New York, occupying a farm near the line of this State, came into Connecticut to obtain payment of a debt due from said Sands. It

¹ This case is followed in Illinois as to assignments of both personal and real estate. *Sheldon v. Wheeler*, 32 Fed. 773 (N. Dist. Ill.); *Consolidated Tank-Line Co. v. Collier*, 148 Ill. 259, 35 N. E. 756; *Smith v. Lamson*, 184 Ill. 71, 56 N. E. 387. *Acc. Chafee v. Fourth Nat. Bank*, 71 Me. 514 (*semble*). The assignment, if not against the public policy of Illinois, is valid as against subsequently attaching foreign creditors. *May v. First Nat. Bank*, 122 Ill. 551, 13 N. E. 806; *Woodward v. Brooks*, 128 Ill. 222, 20 N. E. 685; *Juilliard v. May*, 130 Ill. 87, 22 N. E. 477; *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106. But if the assignment is against the public policy of the situs, even foreign creditors may attach. *Gardner v. Comm. Nat. Bank*, 95 Ill. 298; *Woodward v. Brooks*, 128 Ill. 222, 20 N. E. 685 (*semble*). — Ed.

² Statement of facts and arguments of counsel are omitted. — Ed.

appears from the motion, that the negotiation between the parties as to the mode of paying the defendant was commenced in Connecticut, continued in New York, and afterwards completed (that is, the negotiation), in the former State, which negotiation terminated in an agreement that the debtor should deliver to the creditor *at his residence in New York*, certain articles of property (which are the articles in dispute), in full payment and satisfaction of his debt of \$590. On that day the property was accordingly carried from Connecticut and delivered, and by the creditor received, *at his residence in New York*, and the note was cancelled. The defendant has not at any time since brought the property into this State, but has only made use of it *in New York*, as he would use his own property, claiming indeed that it was his own; and it is for this act of conversion that he is now sued in Connecticut, having come within our borders for a temporary purpose. If these are all the facts in the case, it is obvious, we think, that the defendant is not liable for the property. But are they indeed all? The plaintiff insists that they are not, for he says that on the 21st of October, Sands, being, and having been on the said 19th of October, in failing circumstances and insolvent, to the knowledge of the defendant, and intending soon to make an assignment of his property under and in conformity to the statute of the State for the benefit of insolvent debtors, assigned his property to the plaintiff, and that the defendant knew of this law and was willing and intended by the payment aforesaid to get his debt satisfied in full, while the other creditors might be able to get theirs paid only in part.

I do not understand that there is any claim of fraud or illegality in this transaction, beyond what is implied in the effort of the defendant (which was attended with success), to obtain the full payment of his debt in the manner stated. This then is the question: *was his obtaining or receiving and applying the property of the debtor in New York, where by the law of New York the preference of payment was proper and legal, a valid transaction, or was it, under the circumstances, fraudulent and void?*

We are satisfied that the transfer was a good one, and if good there it is good everywhere, as the law of the situs is the law which must govern the parties in this particular transaction. The agreement between them here and there, and the delivery and acceptance of the property in New York, may well enough be viewed in two aspects — one confined to what took place in New York as the chain of title, and the other taking into account what took place in both States. Either, in my judgment, will lead to a similar conclusion. As to the first, it was agreed that the debt should be paid at the residence of the creditor in New York. The property was there tendered, and there received and applied as agreed, which, in itself, is an unexceptionable transaction, perfectly harmonious with the law of the situs, and what is more, with the duty which the law recognizes in every case of a debt, of making full payment to the creditor.

In this view, I insist, transaction should be held to be a transfer by *delivery* in New York, a matter falling within the exclusive jurisdiction of the State where the parties were, and where the property was to be received by the creditor, who had a perfect right to come here and to demand the payment of his debt and to insist that it should be made to him at that place. The title was thus complete and perfect in New York by the accord and satisfaction and delivery. The preceding negotiation in Connecticut, even had it been confined to this State, which it was not, is not in my judgment a necessary part of the defendant's title. His title is good without it.

If then the title was acquired in New York, why is it not good everywhere else, according to the well settled doctrine of international law, especially as to a citizen of that State? Would not *her* courts insist upon as much as this? We are sure that they would, and if so, the defendant must be held free from accountability here for using or converting this property there, unless we mean to say that among these States the rule of property does not depend upon the law of the *rei situs*, but every sovereignty may act upon its own notions, irrespective of titles and rights required elsewhere. No such notion can be tolerated for a moment as a general rule of property, for it would introduce endless confusion and conflict into all our courts of justice, and make a man's rights of property depend upon the place he happened to be in at the time, and not upon the law of domicile or *rei situs*.

Quite too much stress, I must think, has been laid on a supposed violation of our statute law. In my view there is no such violation. The defendant is not chargeable with anything of the nature of an offence. Being a creditor of Sands in Connecticut, he came to him to get payment. His debtor agreed at once to pay him, and to carry the means of doing it to the creditor's house in New York. He did so, and thereby paid and cancelled his note as he well might do. Was this rendered fraudulent and utterly void, because the creditor understood that his debtor in Connecticut was in failing circumstances or was insolvent, and at an early day expected to make an assignment? We think not. Suppose the creditor had sent a letter to his debtor, instead of coming in person, and thereby induced his debtor to come to him in New York and pay him, would this have destroyed the payment? Or if the debtor, being transiently in New York, should pay his creditor in full, both parties knowing all the circumstances, would a future assignment in Connecticut destroy this payment and render the creditor liable to pay the money to the assignee? We think not. But it would be so, according to the doctrine claimed by the plaintiff's counsel. They insist that a foreign creditor cannot be put on a better ground than a domestic creditor, and surely, say they, such a payment or such an accord and satisfaction cannot be allowed to a domestic creditor. Certainly not. But our law does not reach a New York transaction,

nor does it control a citizen of New York taking property there in payment of his debt. Such a payment cannot be defeated unless our statute is to have an extraterritorial effect, for which no one will contend; so that the objection is not at all of the character assumed by those who urge its application to this case.

Once more, how is the assignment, made as it was two days after the delivery of the property in New York, to affect the title by delivery on the 19th, whether we regard the entire negotiation, or the understanding of the parties and corresponding delivery in New York, as conferring title? The sale was not fraudulent and void at the time, even if it was subject to be avoided by a future assignment, as would only be the case if it was altogether a Connecticut transaction. But it was not such; and since the title passed on the 19th, and was good on that and the next day, it cannot, after that time, be avoided in New York, unless our statute is to operate both retroactively and extraterritorially upon the transaction of the 19th, making void what was valid and legal before.

Let us look at the plaintiff's claim in another point of view. The defendant is said to have come into this State with full knowledge of all the circumstances, and induced the debtor to carry the property in controversy out of the State and pay his New York creditor in full, which, it is said, works a preference in favor of this particular creditor, which our statute does not allow; and it is said that the defendant cannot be allowed therefore to avail himself of it in any manner or to any extent whatever. But wherein is the wrong? Is it in the creditor's inducing his debtor to come into New York and pay him what he justly owed him there, or, in other words, in his inducing the defendant to keep his promise, which the law of the place pronounced to be just and obligatory? *Johnson v. Hunt*, 23 Wend. 87. What then is the crime of the defendant? What has he done that is wicked or wrongful? The thing done, I must think, is neither *malum in se* nor *malum prohibitum*, though within this State, in a certain contingent event, title may be taken away by an express provision of the statute in favor of a general assignee. If, before the assignment is made, the property has been sold and delivered out of the State, beyond the jurisdiction of our law, to a foreign creditor, it is not easy to see how it can be taken from the creditor, without giving to the law an extraterritorial effect which cannot be admitted, and which certainly will not be allowed in that foreign State.

Our view of the case is summarily expressed in the three following propositions: 1st. The title to the property in question passed to the defendant in New York on the 19th day of October, by its delivery and acceptance in payment of his debt; 2d. The insolvent law of Connecticut cannot subsequently divest the creditor of that property; and 3d. A title legally acquired under the law of the situs of the property, is, as a general rule of law, good elsewhere, and will be maintained. Following these principles, we find that the judge of the

superior court was in error in the view which he took of the law upon the facts found, and that the judgment below is erroneous.

In this opinion the other judges concurred, except BUTLER, J., who did not sit in the case.

*Judgment reversed.*¹

OSBORN v. ADAMS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1836.

[Reported 18 Pickering, 245.]

THE parties stated a case. The demandant claimed title to certain land in New Marlborough, in this county, by virtue of certain proceedings under a statute of Connecticut (St. 1828, c. 3, p. 182). Adonijah C. Powell, the original proprietor of the land, on July 16, 1833, at Canton, in Connecticut, under the provisions of that statute, for a nominal consideration, assigned all his property, including the demanded premises, to the demandant, in trust, for the benefit of all of his creditors, both parties to the deed being described as of Canton. On the same day and in connection with the assignment, Powell, by another deed also executed in Connecticut, conveyed to the demandant two parcels of land in New Marlborough, which embraced the demanded premises, the deed referring to the general assignment as to the purposes of the conveyance; and the last mentioned deed was, on the same day, duly recorded in the registry of deeds in this county.

It further appeared, that the demandant had not transferred or sold the land, or in any way distributed any avails of the same; and that he was not a creditor of Powell at the time of the assignment in trust.

The tenant claimed under a conveyance from Edward Stevens and other citizens of Massachusetts, who, as creditors of Powell, on July 20, 1833, attached the premises for debts long before contracted in Massachusetts. The action in which these attachments were made were entered, and judgments having been recovered therein, the executions were duly levied on the demanded premises. By the Connecticut St. 1828, c. 3, p. 182, it is provided that all assignments of real and personal estate by any person in failing circumstances, with a view to his insolvency, to any person or persons, in trust for his creditors, shall, as against the creditors of such assignor, be deemed void, unless made for the benefit of all of such creditors, *pro rata*, and lodged for record in the court of probate; that such trustees shall give bond to

¹ *Acc.* Cragin v. Lamkin, 7 All. 395. Subsequent removal of the property by the assignee to the assignor's or another State will not divest the title of the former. The Watchman, 1 Ware, 232; Forbes v. Scannell, 13 Cal. 242; McKibbin v. Ellingson, 58 Minn. 205, 59 N. W. 1003; Johnson v. Hunt, 23 Wend. 87; Moore v. Willett, 35 Barb. 663. *Contra*, Gardner v. Lewis, 7 Gill, 377. — ED.

the court of probate for the faithful performance of their duties; and that on the complaint of any person interested in the trust, such court may remove any trustee of the property so assigned on sufficient cause being shown for such removal.

The only question raised between the parties was as to the legal effect of the proceedings which took place on July 16, 1833.

If upon these facts the court should be of opinion that the legal title to the premises was in the demandant, the tenant was to be defaulted; but if they should be of opinion that the tenant had the better title, the demandant was to become nonsuit.¹

WILDE, J. As to the assignment under the statute of Connecticut, it is very clear that Powell's title to real estate within this Commonwealth could not pass thereby. The title and disposition of real estate is exclusively subject to the laws of the country where it is situated, which alone can prescribe a mode by which a title to it can pass. *McCormick v. Sullivant*, 10 Wheat. 202. This statutory assignment therefore, in regard to real estate situated in this Commonwealth, is merely void. It can neither pass a title, nor aid one otherwise defective.

The demandant then must rely solely on his conveyance from Powell, and this, no doubt, would be a valid title against a stranger, or any one not claiming under him. But the tenant claims under the creditors of Powell, who attached the demanded premises in a few days after the conveyance to the demandant; and these attachments have been perfected by entry of the actions, and judgments duly rendered thereon, and levy of executions in due form of law. Such being the title of the tenant, it appears to us very clear that the demandant's title cannot prevail against it. The deed to the demandant was a mere voluntary conveyance. No consideration was paid; and although the conveyance to the demandant was in trust for Powell's creditors, yet they were not parties to it, and have not discharged their debts. It is admitted, that no sale or transfer of the demanded premises has been made by the demandant, nor has he in any way distributed any avails of the same. He was not a creditor, but a trustee only; and the trust was created by the proceedings under the statute of the State of Connecticut, of which we can take no notice. The conveyance was ancillary to those proceedings, and those being void as against Powell's creditors, it follows conclusively that there was no consideration on which the conveyance can be maintained against the title derived from those creditors. We can no more take notice of a trust created under a foreign government than we can of a will not proved nor recorded in this Commonwealth. And, independent of the proceedings under the statute of Connecticut, the conveyance to the demandant was merely voluntary. According to the agreement of the parties, therefore, he must become nonsuit.²

¹ Arguments of counsel are omitted. — Ed.

² *Acc.* *Moore v. Church*, 70 Ia. 208, 30 N. W. 855; *Thompkins v. Adams*, 41 Kan. 38, 20 Pac. 530; *Bentley v. Whittemore*, 18 N. J. Eq. 366; *Nat. Exchange Bank v.*

IN RE ARTOLA HERMANOS.

COURT OF APPEAL. 1890.

[Reported 24 *Queen's Bench Division*, 640.]

FRY, L. J.¹ The short facts of this case, as they appear to me to result from the statement of the learned counsel and the evidence before us, especially the statement of affairs which has been put in evidence, are these. There were five brothers, Spaniards by birth, therefore presumably of Spanish domicil of origin. Two of those brothers are residing in Paris, one of them in Spain, and two in England, the five brothers carrying on an extensive business as merchants and bankers in Spain, France, and in England, and they have in Spain large immovable assets. The conclusion from these facts would naturally be that all the five brothers have a Spanish domicil. Nothing has appeared to the contrary of that conclusion, and as the Lord Chief Justice has already observed, Mr. Finlay, who appeared for the applicant, did not desire time to produce evidence to countervail that conclusion.

The application made by the French syndic is of a double character. In the first place, he applies for the rescission of a receiving order. In the next place he asks for a stay of all further proceedings, and that the assets in the English bankruptcy may be handed over to the French syndic. Now, with regard to the receiving order, it appears to me plain that this court had jurisdiction, because the 6th section of the Bankruptcy Act, 1883, refers to the domicil of the debtor or his ordinary residence or permanent place of business for a year before the date of the presentation of the petition. It is not denied that the circumstance of residence in England is present in the case of two of the brothers. Is there then any ground on which it would be improper to exercise the jurisdiction of the court in pronouncing a receiving order? I will not say that a receiving order would be *ex debito justitiæ*; but I think a receiving order ought to be pronounced where the conditions of the Act have been satisfied, unless there be some valid reason to the contrary.

Stelling, 31 S. C. 360, 9 S. E. 1028. Conversely, if the assignment was invalid where made, but was good by the law of the situs, the assignee may hold the land against attaching creditors. *First Nat. Bank v. Hughes*, 10 Mo. App. 7; and see *Chipman v. Peabody*, 159 Mass. 420, 34 N. E. 563. *A fortiori*, if the assignment is valid where made and by the law of the situs, the assignee may hold the land. *King v. Glass*, 73 Ia. 205, 34 N. W. 820; *Palmer v. Mason*, 42 Mich. 146, 3 N. W. 945; *Sortwell v. Jewett*, 9 Oh. 180.

An insolvent assignment by act of court will of course not pass foreign real estate. *Watson v. Holden*, 58 Kan. 666; *Rogers v. Allen*, 3 Oh. 488. And it has been held that a deed of the foreign land, in the form required by the law of the situs, given under order of the Court of Insolvency, in order to obtain a discharge, will not pass the title. *Hutcheson v. Peshine*, 16 N. J. Eq. 167; *Macdonald v. Lumber Co.*, 2 Can. 364; *contra*, *Lamb v. Fries*, 2 Barr. 83. Such a deed will pass the title against the assignor and his heirs. *Harvey v. Edens*, 69 Tex. 420, 6 S. W. 306. — ED.

¹ The concurring opinion of Lord COLERIDGE, C. J., is omitted. — ED.

Now in the present case no such reason has been made out. On the contrary, the presence of assets of the firm to a large extent in this country seems to me, as it seemed to Baggallay, L. J., in *Ex parte Robinson*, 22 Ch. D. 816, to be a strong circumstance in favor of the making of a receiving order. I think, therefore, that, on the merits, the receiving order ought not to be rescinded; but I further express at least my doubt whether the French syndic has any *locus standi* whatever, either to oppose the pronouncing of a receiving order in this country, or to apply for its rescission after it has been pronounced.

Turning to the second portion of the application, namely, that all proceedings in the English bankruptcy may be stayed, I will confess the difficulty which this class of case appears to me to create. Lord Eldon, I think, on more than one occasion described these cases as being very distressing cases, and something of the distress which he felt has, I think, remained to successive judges who have had to deal with these concurrent bankruptcies.

Three views with regard to what was the proper procedure of the court seem to me to have come out during the course of the discussion of the cases. One of those views is this, that where there are concurrent bankruptcies each forum is to administer the assets locally situated within its jurisdiction, each forum of course allowing all the creditors, wherever resident, to prove, but applying the doctrine of hotchpot so as to produce, so far as may be, equality between the proofs of the various creditors. Now no doubt in that mode of procedure there are several inconveniences, especially the possibility of double or triple proofs, but it may be that those inconveniences are less than the inconveniences of any other course. It certainly seems to me that the decision of the House of Lords in the case of *Ewing v. Orr-Ewing*, 9 App. Cas. 34, tends to establish a similar principle with regard to the assets to be administered in administration actions, because in that case they asserted, if I understand the decision rightly, the jurisdiction of the forum in which the assets might be locally situate to administer those assets, although it may be that the law of the domicile may govern the mode of distribution. Now if that rule be applied, it is obvious the application to stay the proceeding must fail.

Another rule which has been suggested is this, that every other forum shall yield to the forum of the domicile, that the forum of every foreign country, every country not of the domicile, shall act only as accessory and in aid of the forum of the domicile. That, it is said, is the *forum concursus*, to which all persons who are interested in the administration of the estate are bound to have recourse. No doubt there is a great deal in point of law and principle to be said in favor of that view, and there are certainly some conveniences in it. If that view were to prevail then this present application fails.¹

¹ The personal estate of a bankrupt, wherever situated, passes to his assignee appointed by the court of his domicile. *Sill v. Worswick*, 1 H. Bl. 665; *Re Howse*, 3 Jut. 14; *Perrin v. Turton*, 1 Transv. Prov. 25. — ED.

Then there is a third view, which is the only one in which the application could be successful, and it is this, that the forum of the country in which the debtor has assets and which first adjudicates him bankrupt, although it be not the forum of the domicile, is entitled to claim the assets from the tribunals of other countries in which he has assets. That doctrine appears to me to be an entirely unreasonable one. There is this broad difference between yielding to the forum of the domicile and yielding to the forum of the first country which happens to pronounce a man bankrupt: — personal property is said to follow the person, and from that it follows that the forum of domicile has, by what has been sometimes called a fiction of law, a right by judgment against a bankrupt to divest him of all personal property and vest it in his assignees, and by the fiction to which I have referred that judgment, pronounced by the forum of the domicile, is said to have universal validity, and to be capable of transferring personal property locally situate beyond the jurisdiction of that forum. The forum, not of the domicile but of the country in which the debtor may have assets, has no such right to claim universal obedience to its judgment; it has no right to pronounce a judgment which will extend beyond the personal assets locally situate within its jurisdiction.

It seems to me, therefore, that the contention which, as I have already said, is the only one on which the application can succeed — that every other forum must yield to the forum of a country, in which there are assets, which first pronounces the bankruptcy — is one inconsistent with well-known principles of law. But then it is said that *Stein's Case*, 1 Rose, 462, proceeds on that principle, and it was elaborately and ably urged upon us that that was the true view of that case. I do not conceal from myself that there are difficulties in that case. It is not easy to see what were the facts on which the court arrived at the conclusion with regard to the domicile at which they did arrive. Further, it would appear that the Scotch court considered, and for aught I know considered rightly according to Scotch law, that a firm of merchants has a domicile as a firm, and they seem further to have considered that a firm is capable of having two domicils, and they chose between the two domicils only by priority of adjudication. But nevertheless the case proceeds upon this main principle, that the court of the domicile has the right to pronounce a universally valid judgment with regard to the personal property of the bankrupt. That proposition underlies the decision, and whatever difficulties there may be in the application of it do not detract from it. That general principle is fatal to the present application.

Therefore I entirely agree with the Lord Chief Justice in the judgment which he has given, and I think this application must fail.

Appeal dismissed.

IN THE MATTER OF THE ACCOUNTING OF WAITE.

COURT OF APPEALS, NEW YORK. 1885.

[Reported 99 New York, 433.]

EARL, J. On the 15th day of October, 1881, Haynes & Sanger, a firm doing business in the city of New York, having become insolvent, made a general assignment, for the benefit of their creditors, to Charles Waite, who was a member of the firm of Pendle & Waite, and in their assignment preferred that firm as creditors for a large amount. Pendle & Waite did business in New York and London, Waite being a citizen of this country residing in the city of New York and having charge of the business of his firm there, and Pendle being a citizen of England and having charge of the firm business there. That firm became insolvent and suspended business in England in February, 1882, and Waite then went to England, and there he and Pendle filed a petition in the London Court of Bankruptcy, in which they recited their inability to pay their debts in full, and that they were "desirous of instituting proceedings for the liquidation of their affairs by arrangement or composition with their creditors, and hereby submit to the jurisdiction of this court in the matter of such proceeding." Waite signed the petition in person, and through his counsel at once secured the appointment of Schofield as receiver, in bankruptcy, of the firm property.

Liquidation by arrangement or composition is a proceeding under the English bankruptcy act which provides that the filing of such a petition is an act of bankruptcy; that a compromise proposition may be made by a debtor, and that if such proposition shall be accepted by the creditors at a general meeting, and then confirmed at a second general meeting, and registered by the court, it becomes binding and may be carried out under the supervision of the court; that if it appears to the court on satisfactory evidence that a composition cannot in consequence of legal difficulties, or for any other sufficient cause, proceed without injustice or undue delay to the creditors, or the debtor, the court may adjudge the debtor a bankrupt and proceedings may be had accordingly, and that the title of the trustee in bankruptcy, when appointed, relates back to the time of the commission of the act of bankruptcy.

For reasons which it is unnecessary now to consider or relate, the composition failed, and then upon the application of creditors, which was opposed by Waite, Pendle & Waite were adjudged bankrupts, and Schofield was appointed trustee of the firm property. By the English law, the due appointment of a trustee in bankruptcy, under the English bankruptcy act, transfers to the trustee all the personal property of the bankrupt wherever situated, whether in Great Britain or elsewhere.

Notwithstanding his bankruptcy, Waite continued to act as assignee

of Haynes & Sanger and converted the assets of that firm into money, and under the preference given to his firm paid himself for the firm of Pendle & Waite the sum of \$14,333.70. He paid no portion of that sum to Pendle or to the creditors of his firm, the American creditors of such firm having been fully paid from other assets of the firm.

After all this, Waite filed his petition in the Court of Common Pleas of the city of New York for a settlement of his accounts as assignee, and citations were issued, served, and published for that purpose, and a referee was appointed to take and state his accounts. In his accounts he entered and claimed a credit for the sum paid to himself as above stated. Schofield, through his attorney, appeared upon the accounting and as trustee objected to the credit and claimed that sum should be paid to him. The referee ruled that the law of this State does not recognize the validity of foreign bankruptcy proceedings to transfer title to property of the bankrupt situated here, and for that reason held that the payment by Waite, as assignee, to himself as a member of the firm of Pendle & Waite, was valid, and that he was entitled to the credit claimed. The same view of the law was taken at the special and general terms of the common pleas, and then Schofield appealed to this court.

We have stated the facts as found by the referee, and as the respondent did not and could not except to the findings, and is therefore in no condition to complain of them, we must assume that they were based upon sufficient evidence.

The transfer of the property of Pendle & Waite to Schofield as trustee was *in invitum*, solely by operation of the English bankrupt law. While the proceeding first instituted by the bankrupts to arrange a composition with their creditors was voluntary, the final proceeding through which the adjudication in bankruptcy was had, and the trustee appointed was adversary and against their will, having no basis of voluntary consent to rest on. *Willitts v. Waite*, 25 N. Y. 577.

If the transfer effected by the bankruptcy proceedings is to have the same effect here as in England, then the title to the money due to the bankrupts from Haynes & Sanger was vested in the trustee. Schofield was appointed receiver of the property of the bankrupts in March, 1882, and then the title passed out of them. That title continued in him as receiver until he was appointed trustee. After he was appointed receiver and before or after he was appointed trustee (which does not appear), Waite as assignee paid himself as a member of the firm of Pendle & Waite the sum of money in controversy. He had notice of the bankruptcy proceedings and knew that the title to the money due from Haynes & Sanger and from himself as their assignee had passed out of the bankrupts to Schofield, and hence he had no right to make payment to them. Schofield became substituted in their place, and Waite was bound to make payment to him, and cannot, therefore, have credit for a payment wrongfully made. And Schofield, standing in

the place of the original creditors of Haynes & Sanger, had the right to appear upon the accounting and object to the erroneous payment made in disregard of his rights. But the alleged payment was merely formal, not real. Waite, the assignee, still has the money and is accountable for it to the proper party. It is not perceived how it can be claimed that Schofield was bound at any time before the accounting to make any demand upon the assignee. He was a creditor holding the claim originally due to Pendle & Waite, and as such he could appear upon the accounting, with all the rights of any other creditor, to protect his interests, and he could not be prejudiced by a payment alleged to have been made by the assignee to himself. All this is upon the assumption that the transfer to Schofield as trustee is to have the same force and effect here as against the bankrupts as in England; and whether it must have, is the important and interesting question to be determined upon this appeal.

It matters not that Waite was a citizen of this country, domiciled here. He went to England and invoked and submitted to the jurisdiction of the bankruptcy court there and is bound by its adjudication to the same extent as if he had been domiciled there. The adjudication estopped him just as every party is estopped by the adjudication of a court which has jurisdiction of his person and of the subject-matter.

We have not a case here where there is a conflict between the foreign trustee and domestic creditors. So far as appears no injustice whatever will be done to any of our own citizens, or to any one else, by allowing the transfer to have full effect here. Indeed justice seems to require that this money should be paid to the foreign trustee for distribution among the foreign creditors of the bankrupts.

The effect to be given in any country to statutory *in invitum* transfers of property through bankruptcy proceedings in a foreign country has been a subject of much discussion among publicists and judges, and unanimity of opinion has not and probably never will be reached. We shall not enter much into the discussion of the subject and thus travel over ground so much marked by the footsteps of learned jurists. Our main endeavor will be to ascertain what, by the decisions of the courts of this State, has become the law here.¹

In *Willitts v. Waite* (25 N. Y. 577), it was held that statutory receivers appointed in Ohio could not enforce their title to the property of the insolvent in this State against creditors subsequently attaching it here, under our laws. In that case, while Sutherland, J., was of opinion that from comity the courts of this State should recognize and allow some effect to a foreign involuntary bankrupt proceeding, yet he erroneously said that he understood that a title under such proceedings

¹ The learned judge here examined the following cases: *Bird v. Caritat*, 2 Johns. 342; *Raymond v. Johnson*, 11 Johns. 488; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Holmes v. Remsen*, 20 Johns. 229; *Plestorio v. Abraham*, 1 Paige, 236, 3 Wend. 538; *Johnson v. Hunt*, 23 Wend. 87; *Hoyt v. Thompson*, 5 N. Y. 320, 19 N. Y. 207. — ED.

"would not be recognized by the courts of this State, even when the question arises entirely between the bankrupt and his assignees and creditors all residing in the country under whose laws the assignment was made." Allen, J., writing in the same case, said: "A *quasi* effect may be given to the law (of a foreign State) as a matter of comity and interstate or international courtesy, when the rights of creditors or *bona fide* purchasers, or the interests of the State do not interfere, by allowing the foreign statutory or legal transferee to sue for it in the courts of the State in which the property is;" and that "the State will do justice to its own citizens so far as it can be done by administering upon property within its jurisdiction, and will yield to comity in giving effect to foreign statutory assignments only so far as may be done without impairing the remedies or lessening the securities which our laws have provided for our own citizens." The rule, as stated by Judges Platt, Ruggles, Allen, and other eminent jurists, whose opinions we have quoted, were also fully recognized in the following cases: *Peterson v. Chemical Bk.*, 32 N. Y. 21; *Kelly v. Crapo*, 45 N. Y. 86; *Osgood v. Maguire*, 61 N. Y. 524; *Hibernia Bk. v. Lacombe*, 84 N. Y. 367; *Matter of Bristol*, 16 Abb. Pr. 184; *Runk v. St. John*, 29 Barb. 585; *Barclay v. Quicksilver Mining Co.*, 6 Lans. 25; *Hooper v. Tuckerman*, 3 Sandf. 311; *Olyphant v. Atwood*, 4 Bosw. 459; *Hunt v. Jackson*, 5 Blatchf. 349.

From all these cases the following rules are to be deemed thoroughly recognized and established in this State: (1) The statutes of foreign States can in no case have any force or effect in this State *ex proprio vigore*, and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. (2) But the comity of nations which Judge Denio in *Peterson v. Chemical Bank* (*supra*) said is a part of the common law, allows a certain effect here to titles derived under, and powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced here, when they can be, without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided also that such titles are not in conflict with the laws or the public policy of our State. (3) Such foreign assignees can appear and, subject to the conditions above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with, or withhold the property of the bankrupt.

If it be admitted, as it must be under the authorities cited, that Schofield can, as assignee of Pendle & Waite, have a standing in our courts, and that his title will be so far recognized here that he can sue the debtors of that firm to recover the amount owing to the firm, why may he not sue the bankrupts? If the assignee could sue Haynes & Sanger to recover what they owed the bankrupts, why can he not be permitted to sue the bankrupts for money or property placed in their hands to pay the debt? If he could sue Haynes & Sanger, why could

not he sue their assignee, although a member of the bankrupt firm, to recover the money placed in his hands to pay their debt? No principle of justice, no public policy requires the courts of this State to ignore the title of this assignee at the instance of one of the bankrupts. No injustice will be done to Waite if this money be taken to pay his creditors, and public policy does not require that the courts of this State should protect him in his efforts either to cheat his creditors or his partner. If it be conceded, as it must be, that the title of a foreign statutory assignee is good in this State for any purpose against anybody, it seems to us that it ought to be held good against the bankrupt against whom an adjudication in bankruptcy has been pronounced which is binding upon him.

Before such an adjudication can be held to be efficacious in a foreign country to transfer title to property, the bankrupt court must have had jurisdiction of the bankrupt either because made in the country of his domicile or because he, although domiciled elsewhere, submitted to the jurisdiction or in some other way came under the jurisdiction of the bankrupt court. Here Pendle & Waite did most of their business in England. Most of their assets and of their creditors were there, and while Pendle alone was domiciled there, Waite went there and submitted to the jurisdiction of the bankrupt court and exposed himself to the operation of English law. He is therefore bound by the adjudication of the court as he would have been if domiciled there, and the judgment had been in a common law court upon any personal cause of action.

The decisions in the federal courts, and in most of the other States, are in harmony with the views we have expressed; and so are the doctrines of all the great jurists who have written upon the subject of private international law. 2 Bell's Comm. 681, 687; Wheaton's Int. L. [8th ed., by Dana], §§ 89, 90, 91, 144 and note; 2 Kent's Comm. 405; Wharton's Conf. of Laws, §§ 353, 368, 391, 735, 736; Story's Conf. of Laws, §§ 403, 410, 412, 414, 420, 421.

There are but two cases in this State which really hold anything in conflict with these views, and they are *Mosselman v. Caen* (34 Barb. 66; N. Y. Sup. Ct. [4 T. & C.] 171). In the first case the action was by foreign trustees, appointed in bankruptcy proceedings, to recover goods in the possession of the defendant in this country, and the plaintiffs recovered. The defendant appealed, and sought to reverse the judgment upon the ground that the plaintiffs did not, as trustees, have any title to the property. The judgment was affirmed, on the ground that the defendant did not raise the question of title at the trial. But the judges writing were of opinion that the plaintiffs did not have any title to the bankrupt's property located here, and one of them (Sutherland, J.) stated that the case of *Abraham v. Plestoro* (3 Wend. 538), confirmed by *Johnson v. Hunt*, "would seem to be conclusive upon the question, whether our courts will recognize or enforce a right or title acquired under a foreign bankrupt law or foreign bank-

ruptcy judicial proceedings. The case of *Abraham v. Plestoro* was certainly very broad in its repudiation of foreign bankruptcy proceedings, and went much further than the case of *Holmes v. Remsen* (20 Johns. 229) ; but I think it must be deemed conclusive authority for saying, that had the defendant raised the question by demurrer, or on the trial, it must have been held that the plaintiffs could not maintain this action." In the second case *Davis, P. J.*, writing the opinion of the court, said: "It seems to be the settled law of this State that our courts will not recognize or enforce a right or title acquired under a foreign bankrupt law, or foreign bankrupt proceedings, so far as affects property within their jurisdiction, or demands against residents of the State." These two cases are unsupported by authority, and are, we think, opposed to sound principles, and are in conflict with the current of authority in this State.

We are, therefore, of opinion that Schofield was competent to appear upon the accounting to protect the interests of the bankrupt estate which he represented, and that, upon the facts as they appear in this record, his objection to the allowance of the payment made by the assignee to himself ought to have prevailed, and that he should be recognized as a creditor for the amount of such payment.

It follows that the orders of the General and Special Terms should be reversed, and, as the facts may be varied or more fully presented upon a new hearing, the matter should be remitted to the Special Term for further proceedings upon the same or new evidence, in accordance with the rules of law herein laid down, and that the appellant should recover from the respondent costs of the appeals to the General Term and to this court.

All concur.

Ordered accordingly.

SECURITY TRUST COMPANY v. DODD, MEAD & CO.

SUPREME COURT OF THE UNITED STATES. 1899.

[*Reported 173 United States, 624.*]

THIS was an action originally instituted in the District Court for the Second Judicial District of Minnesota, by the Security Trust Company, as assignee of the D. D. Merrill Company, a corporation organized under the laws of Minnesota, against the firm of Dodd, Mead & Company, a partnership resident in New York, to recover the value of certain stereotyped and electrotyped plates for printing books, upon the ground that the defendants had unlawfully converted the same to their own use. The suit was duly removed from the State court to the Circuit Court of the United States for the District of Minnesota, and was there tried. Upon such trial the following facts appeared:—

The D. D. Merrill Company having become insolvent and unable to pay its debts in the usual course of business, on September 23, 1893, executed to the Security Trust Company, the plaintiff in error, an assignment under and pursuant to the provisions of chapter 148 of the laws of 1881 of the State of Minnesota, which assignment was properly filed in the office of the clerk of the District Court. The Trust Company accepted the same, qualified as assignee, took possession of such of the property as was found in Minnesota, and disposed of the same for the benefit of creditors, the firm of Dodd, Mead & Company having full knowledge of the execution and filing of such assignment.

At the date of this assignment, the D. D. Merrill Company was indebted to Dodd, Mead & Company of New York in the sum of \$1,249.98, and also to Alfred Mudge & Sons, a Boston co-partnership in the sum of \$126.80, which they duly assigned and transferred to Dodd, Mead & Company, making the total indebtedness to them \$1,376.78.

Prior to the assignment, the D. D. Merrill Company was the owner of the personal property for the value of which this suit was brought. This property was in the custody and possession of Alfred Mudge & Sons at Boston, Massachusetts, until the same was attached by the sheriff of Suffolk County, as hereinafter stated.

The firm of Alfred Mudge and Sons was, prior to March 8, 1894, informed of the assignment by the Merrill Company, and at about the date of such assignment a notice was served upon them by George E. Merrill to the effect that he Merrill, took possession of the property in their custody for and in behalf of the Security Trust Company, assignee aforesaid.

On March 8, 1894, Dodd, Mead & Company commenced an action against the D. D. Merrill Company in the superior court of the county of Suffolk, upon their indebtedness, caused a writ of attachment to be issued, and the property in possession of Mudge & Sons seized upon such writ. A summons was served by publication in the manner prescribed by the Massachusetts statutes, although there was no personal service upon the Merrill Company. The Security Trust Company, its assignee, was informed of the bringing and pendency of this suit and the seizure of the property, prior to the entering of a judgment in said action, which judgment was duly rendered August 6, 1894, execution issued, and on September 27, 1894, the attached property was sold at public auction to Dodd, Mead & Company, the execution creditors, for the sum of \$1,000.

Upon this state of facts, the Circuit Court of Appeals certified to this court the following questions:—

“First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualification as assignee thereunder, vest said assignee with the title to the personal property aforesaid, then located in the State of Massa-

chusetts, and in the custody and possession of said Alfred Mudge & Sons?

"Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk County, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim?"

BROWN, J. This case raises the question whether an assignee of an insolvent Minnesota corporation can maintain an action in the courts of Minnesota for the conversion of property formerly belonging to the insolvent corporation, which certain New York creditors had attached in Massachusetts, and sold upon execution against such corporation. The question was also raised upon the argument how far an assignment, executed in Minnesota, pursuant to the general assignment law of that State, by a corporation there resident, is available to pass personal property situated in Massachusetts as against parties resident in New York, who, subsequent to the assignment, had seized such property upon an attachment against the insolvent corporation.

The assignment was executed under a statute of Minnesota, the material provisions of which are hereinafter set forth. The instrument makes it the duty of the assignee "to pay and discharge, in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of the first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter 148 of the General Laws of the State of Minnesota for the year 1881, and the several laws amendatory and supplementary thereof, and if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend to the payment of said debts and liabilities and interest, proportionately on their respective amounts, according to law and the statute in such case made and provided; and if, after the payment of all the costs, charges, and expenses attending the execution of said trust, and the payment and discharge in full of all the said debts of the party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then, Third, repay such surplus to the party of the first part, its successors and assigns."

The operation of voluntary or common law assignments upon property situated in other States has been the subject of frequent discus-

sion in the courts, and there is a general consensus of opinion to the effect that such assignments will be respected, except so far as they come in conflict with the rights of local creditors, or with the laws or public policy of the State in which the assignment is sought to be enforced. The cases in this court are not numerous, but they are all consonant with the above general principle. *Black v. Zacharie*, 3 How. 483; *Livermore v. Jenckes*, 21 How. 126; *Green v. Van Buskirk*, 5 Wall. 307; *Hervey v. R. I. Locomotive Works*, 93 U. S. 664; *Cole v. Cunningham*, 133 U. S. 107; *Barnett v. Kinney*, 147 U. S. 476.

But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a State insolvent law operates only upon property within the territory of that State, and that with respect to property in other States it is given only such effect as the laws of such State permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another State. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the State where the property is actually situated. *Harrison v. Sterry*, 5 Cranch, 289, 302; *Ogden v. Saunders*, 12 Wheat. 213; *Booth v. Clark*, 17 How. 322; *Blake v. Williams*, 6 Pick. 286; *Osborn v. Adams*, 18 Pick. 245; *Zipcey v. Thompson*, 1 Gray, 243; *Abraham v. Plestoro*, 3 Wend. 538, overruling *Holmes v. Remsen*, 4 Johns. Ch. 460; *Johnson v. Hunt*, 23 Wend. 87; *Hoyt v. Thompson*, 5 N. Y. 320; *Willits v. Waite*, 25 N. Y. 577; *Kelly v. Crapo*, 45 N. Y. 86; *Barth v. Backus*, 140 N. Y. 230; *Weider v. Maddox*, 66 Tex. 372; *Rhawn v. Pearce*, 110 Ill. 350; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477. As was said by Mr. Justice McLean in *Oakey v. Bennett*, 11 How. 33, 44, "A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment." Similar language is used by Mr. Justice Story in his *Conflict of Laws*, § 414.¹

The statute of Minnesota, under which this assignment was made, provides in its first section that any insolvent debtor "may make an

¹ *Acc. Le Chevalier v. Lynch*, 1 Doug. 170; *Reynolds v. Adden*, 136 U. S. 248; *Betton v. Valentine*, 1 Curt. 168; *Paine v. Lester*, 44 Conn. 196; *Rhawn v. Pearce*, 110 Ill. 350; *Johnson v. Parker*, 4 Bush. 149 (*semble*); *Metcalf v. Yeaton*, 51 Me. 198; *Wood v. Parsons*, 27 Mich. 159; *Beer v. Hooper*, 32 Miss. 246; *Hoyt v. Thompson*, 19 N. Y. 207; *Bizzell v. Bedient*, 2 Car. L. Rep. 254; *Milne v. Moreton*, 6 Binn. 353; *Goodsell v. Benson*, 13 R. I. 225 (*semble*); *McClure v. Campbell*, 71 Wis. 350, 37 N. W. 343. *Contra*, *Long v. Girdwood*, 150 Pa. 413, 24 Atl. 711. — Ed.

assignment of all his unexempt property for the equal benefit of all his *bona fide* creditors, who shall file releases of their demands against such debtor, as herein provided." That such assignments shall be acknowledged and filed, and if made within ten days after the assignor's property has been garnished or levied upon, shall operate to vacate such garnishment or levy at the option of the assignee, with certain exceptions. The second section provides for putting an insolvent debtor into involuntary bankruptcy on petition of his creditors, upon his committing certain acts of insolvency, and for the appointment by the court of a receiver with power to take possession of all his property, not exempt, and distribute it among his creditors. Under either section only those creditors receive a benefit from the act who file releases to the debtor of all their demands against him. This statute was held not to conflict with the Federal Constitution in *Denny v. Bennett*, 128 U. S. 489.

The construction given to this act by the Supreme Court of Minnesota has not been altogether uniform. In *Wendell v. Lebon*, 30 Minn. 234, the act was held to be constitutional. It was said that "the act in its essential features is a bankrupt law;" but it was intimated that it included all the debtor's property wherever situated; "and while other jurisdictions might, on grounds of policy, give preference to domestic attaching creditors over foreign assignees or receivers in bankruptcy, yet, subject to this exception, they would, on principles of comity, recognize the rights of such assignees or receivers to the possession of the property of the insolvent debtor."

In *In re Mann*, 32 Minn. 60, the act was, in effect, again pronounced "a bankrupt law, providing for voluntary bankruptcy by the debtor's assignment;" and in this respect differing from a previous assignment law. See also *Simon v. Mann*, 33 Minn. 412, 414.

In *Jenks v. Ludden*, 34 Minn. 482, it was held that the courts of that State had no right to enjoin the defendant, who was a citizen of Minnesota, from enforcing an attachment lien on certain real property in Wisconsin owned by the insolvent debtors, although the execution of the assignment might, under the Minnesota statute, have dissolved such an attachment in that State; and that, even if they had the power to do so, they ought not to exercise their discretion in that case, where the only effect might be to enable non-resident creditors to step in and appropriate the attached property. The court repeated the doctrine of the former case, that the act was a bankrupt act; the assignee being in effect an officer of the court, and the assigned property being in *custodia legis*, and administered by the court or under its direction. The court added: "We may also take it as settled that the question whether property situated in Wisconsin is subject to attachment or levy by creditors, notwithstanding any assignment made in another State, is to be determined exclusively by the laws of Wisconsin." To the same effect see *Daniels v. Palmer*, 35 Minn. 347; *Warner v. Jaffray*, 96 N. Y. 248.

Upon the other hand, in *Covey v. Cutler*, 55 Minn. 18, an insolvent debtor who had made an assignment under this statute, had a certain amount of salt in Wisconsin, which the defendants had attached in a Wisconsin court. The salt was sold upon the judgment, bid in by them, and the assignee in Minnesota brought an action to recover the value of the salt. Defendants answered, claiming that the assignee never took possession of the salt, and that the Minnesota assignment was ineffectual to transfer the title to property in Wisconsin as against attaching creditors there. Plaintiff was held entitled to judgment upon the ground that a voluntary conveyance of personal property, valid by the law of the place, passed title wherever the property may be situated and that such transfers, upon principles of comity, would be recognized as effectual in other States when not opposed to public policy or repugnant to their laws. It is difficult to reconcile this with the previous cases, or with that of *Green v. Van Buskirk*, 7 Wall. 139. The assignment was apparently treated as a voluntary or common law assignment. This ruling was repeated in *Hawkins v. Ireland*, 64 Minn. 339, in which an assignment under this statute was said not to be involuntary but voluntary, and that a court of equity had the power to, and would, restrain one of its own citizens, of whom it had jurisdiction, from prosecuting an action in a foreign State or jurisdiction, whenever the facts of the case made it necessary to do so, to enable the court to do justice and prevent one of its citizens from taking an inequitable advantage of another. This accords with *Dehon v. Foster*, 4 Allen, 545, and *Cunningham v. Butler*, 142 Mass. 47; s. c., *sub nom.* *Cole v. Cunningham*, 133 U. S. 107.

The earlier opinions of the Supreme Court of Minnesota to the effect that the statute in question was a bankrupt act, were followed by the Supreme Court of Wisconsin in *McClure v. Campbell*, 71 Wis. 350, in which it was held that the assignment could have no legal operation out of the State in which the proceedings were had, and that the decision of the Supreme Court of Minnesota that the act of 1881 was a bankrupt act was binding. The contest was between the assignee of the insolvent debtor and a creditor who had attached the property of the insolvent in Wisconsin. The court held that the plaintiff, the assignee, took no title to such property, and was not entitled to its proceeds. In delivering the opinion the court said: "We think the question is not affected by the fact that the property, when seized, was in the possession of the assignee, or that the attaching creditor is a resident of the State in which the insolvency or bankruptcy proceedings were had. . . . While some of them" (the cases) "may, under especial circumstances, extend the rule of comity to such a case, and thus give an extraterritorial effect to somewhat similar assignments, we are satisfied that the great weight of authority is the other way. The rule in this country is, we think, that assignments by operation of law in bankruptcy or insolvency proceedings, under which debts may be compulsorily discharged without full payment thereof, can

have no legal operation out of the State in which such proceedings were had."

In *Frauzen v. Hutchinson*, 94 Iowa, 95, 62 N. W. Rep. 698, the Supreme Court of Iowa had this statute of Minnesota under consideration, and held that as the creditors received no benefit under the assignment, unless they first filed a release of all claims other than such as might be paid under the assignment, it would not be enforced in Iowa. It was said that the assignment, which was that of an insurance company, was invalid, and that in an action by the assignee for premiums collected by the defendants, who were agents of the company, the latter could offset claims for unearned premiums held by policy holders at the time of the assignment and by them assigned to defendants after the assignment to plaintiffs.

Notwithstanding the two later cases in Minnesota above cited, we are satisfied that the Supreme Court of that State did not intend to overrule the prior decisions to the effect that the act was substantially a bankrupt or insolvent law. It is true that in these cases a broader effect was given to this act with respect to property in other States than is ordinarily given to statutory assignments, though voluntary in form. But the court was speaking of its power over its own citizens, who had sought to obtain an advantage over the general creditors of the insolvent by seizing his property in another State. There was no intimation that the prior cases were intended to be overruled, nor did the decisions of the later cases require that they should be.

So far as the courts of other States have passed upon the question, they have generally held that any State law upon the subject of assignments, which limits the distribution of the debtor's property to such of his creditors as shall file releases of their demands, is to all intents and purposes an insolvent law; that a title to personal property acquired under such laws will not be recognized in another State, when it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, though the proceedings were instituted subsequent to and with notice of the assignment in insolvency. The provision of the statute in question requiring a release from the creditors in order to participate in the distribution of the estate, operates as a discharge of the insolvent from his debts to such creditors — a discharge as complete as is possible under a bankrupt law. An assignment containing a provision of this kind would have been in many, perhaps in most, of the States void at common law. *Grover v. Wakeman*, 11 Wend. 187; *Ingraham v. Wheeler*, 6 Conn. 277; *Atkinson v. Jordan*, 5 Hamm. 293; *Burrill on Assignments*, 232 to 256. As was said in *Conkling v. Carson*, 11 Ill. 503: "A debtor in failing circumstances has an undoubted right to prefer one creditor to another, and to provide for a preference by assigning his effects; but he is not permitted to say to any of his creditors that they shall not participate in his present estate, unless they release all right to satisfy the residue of their debts out of his future acquisitions." In *Brashear v. West*,

7 Pet. 608, an assignment containing a provision of this kind was upheld with apparent reluctance solely upon the ground that in Pennsylvania, where the assignment was made, it had been treated as valid. If the assignment contain this feature, the fact that it is executed voluntarily and not *in invitum* is not a controlling circumstance. In some States a foreign assignee under a statutory assignment, good by the law of the State where made, may be permitted to come into such State and take possession of the property of the assignor there found, and withdraw it from the jurisdiction of that State in the absence of any objection thereto by the local creditors of the assignor; but in such case the assignee takes the property subject to the equity of attaching creditors, and to the remedies provided by the law of the State where such property is found.

A somewhat similar statute of Wisconsin was held to be an insolvent law in *Barth v. Backus*, 140 N. Y. 230, and an assignment under such statute treated as ineffectual to transfer the title of the insolvent to property in New York, as against an attaching creditor there, though such creditor was a resident of Wisconsin. A like construction was given to the same statute of Wisconsin in *Townsend v. Coxe*, 151 Ill. 62. It was said of this statute (and the same may be said of the statute under consideration), "It is manifest from these provisions that a creditor of an insolvent debtor in Wisconsin, who makes a voluntary assignment, valid under the laws of that State, can only avoid a final discharge of the debtor from all liability on his debt, by declining to participate in any way in the assignment proceedings. He is, therefore, compelled to consent to a discharge as to so much of his debt as is not paid by dividends in the insolvent proceedings or take the hopeless chance of recovering out of the assets of the assigned estate remaining after all claims allowed have been paid." To the same effect are *Upton v. Hubbard*, 28 Conn. 274; *Paine v. Lester*, 44 Conn. 196; *Weider v. Maddox*, 66 Tex. 372; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477; *Boese v. King*, 78 N. Y. 471.

In *Taylor v. Columbia Insurance Co.*, 14 Allen, 353, it is broadly stated that "when, upon the insolvency of a debtor, the law of the State in which he resides assumes to take his property out of his control, and to assign it by judicial proceedings, without his consent, to trustees for distribution among his creditors, such an assignment will not be allowed by the courts of another State to prevail against any remedy which the laws of the latter afford to its own citizens against property within its jurisdiction." But the weight of authority is, as already stated, that it makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent or upon the voluntary application of the insolvent himself. The assignee is still the agent of the law, and derives from it his authority: *Upton v. Hubbard*, 28 Conn. 274.

While it may be true that the assignment in question is good as between the assignor and the assignee, and as to assenting creditors, to

pass title to property both within and without the State, and, in the absence of objections by non-assenting creditors, may authorize the assignee to take possession of the assignor's property wherever found, it cannot be supported as to creditors who have not assented, and who are at liberty to pursue their remedies against such property of the assignor as they may find in other States. *Bradford v. Tappan*, 11 Pick. 76; *Willitts v. Waite*, 25 N. Y. 577; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, and cases above cited.

We are therefore of opinion that the statute of Minnesota was in substance and effect an insolvent law; was operative as to property in Massachusetts only so far as the courts of that State chose to respect it, and that so far as the plaintiff, as assignee of the D. D. Merrill Company, took title to such property, he took it subservient to the defendants' attachment. It results that the property of the D. D. Merrill Company found in Massachusetts was liable to attachment there by these defendants, and that the courts of Minnesota are bound to respect the title so acquired by them.

The second question must therefore be answered in the negative, and as this disposes of the case, no answer to the first question is necessary.¹

BLAKE v. McCLUNG.

SUPREME COURT OF THE UNITED STATES. 1898.

[*Reported 172 United States*, 239.]

HARLAN, J. ² THE Embreeville Freehold Land, Iron and Railway Company, Limited — to be hereafter called the Embreeville Company — was a corporation organized under the laws of Great Britain and Ireland for mining and manufacturing purposes. In 1890 it registered its charter under the provisions of the above statute, and established a manager's office in Tennessee. It purchased property and did a mining and manufacturing business there, transacting its affairs in this country at and from its Tennessee office.

On the 20th day of June, 1893, C. M. McClung & Co. and others filed an original general creditors' bill in the Chancery Court of Washington County, Tennessee, against this company and others, alleging its insolvency and default in meeting and discharging its current obligations; charging that it had made a conveyance in trust of certain personal property in fraud of the rights of its other creditors, and asking the appointment of a receiver and the administration of its affairs

¹ *Acc. Townsend v. Cox*, 151 Ill. 62, 37 N. E. 689; *Franzen v. Hutchinson*, 94 Ia. 95, 62 N. W. 698; *Barth v. Backus*, 140 N. Y. 230, 35 N. E. 425. *Contra*, *Whitman v. Mast Buford & Burwell Co.*, 11 Wash. 318, 39 Pac. 649. — Ed.

² Part of the opinion is omitted. — Ed.

as an insolvent corporation. The court took jurisdiction of the corporation, sustained the bill as a general creditors' bill, appointed a receiver of its property in Tennessee, administered its affairs in that State, and passed a decree adjudicating the rights and priorities of certain creditors.

No question is made in respect to the amount due to any one of the creditors whose claims were presented.

The company maintained its home office in London, its managing director resided there, and after this suit was instituted liquidation under the Companies' Acts of Great Britain was there ordered and begun.

There were holders of debentures executed by the British company whose claims were not specifically adjudicated in the decree below. The original debenture issue amounted to \$500,000, and another issue, subsequent in time, and in respect of which priority in right was claimed, amounted to \$125,000. All the holders of those issues are non-residents of Tennessee and of the United States. There was also a general trade indebtedness aggregating about \$90,000 due by the company to residents of Great Britain. Those claims were specifically adjudicated by the decree.

Among the creditors of the company at the time this suit was instituted were the plaintiffs in error, namely: C. G. Blake, whose residence and place of business was in Ohio; Rogers, Brown & Company, the members of which also resided in Ohio and carried on business in that State; and the Hull Coal & Coke Company, a corporation of Virginia. In the intervening petitions filed by those creditors it was averred that the plaintiffs in the general creditor's bill, residents of Tennessee, claimed priority of right in the distribution of the assets of the insolvent corporation over other creditors of the corporation "citizens of the United States, but not of the State of Tennessee;" and that the said statute was unconstitutional so far as it gave preferences and benefits to the plaintiffs or other citizens of Tennessee over the petitioners or other citizens of the United States. . . .

The cause was carried to the Supreme Court of Tennessee, and so far as the plaintiffs in error are concerned was heard in that court upon appeal from the Chancery Court of Appeals, as well as upon writs of error to the Chancery Court.

It was adjudged by the Supreme Court of the State that the act of March 19, 1877, was in all respects a valid enactment, and not in contravention of paragraph 2 of Article IV. or of the Fourteenth Amendment of the Constitution of the United States, nor in contravention of any other provision of the National Constitution;¹ that all of the

¹ Section 5 of this act provides "That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities, and engagements of the said corporations, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements, and contracts. Nevertheless, creditors who may be residents

holders and owners of the debenture bonds of the Embreeville Company were simple contract creditors of the company, and stood upon the same footing with reference to the distribution of its assets as all of its other creditors who "reside out of the State of Tennessee," whether they be residents of other States or of the Kingdom of Great Britain; that all of the creditors of the Embreeville Company "who resided in the State of Tennessee" are entitled to priority of payment out of all of the assets of said company, both real and personal, over all of the other creditors of said company who do not reside in the State of Tennessee, whether they be residents of other States of the United States or of the Kingdom of Great Britain; that all of the creditors of the Embreeville Freehold Land, Iron & Railway Company who reside out of the State of Tennessee, whether they reside in other States of the United States or in the Kingdom of Great Britain, have the right and must share equally and ratably in the distribution of said funds of the said company after the residents of the State of Tennessee shall have been first paid in full.

The plaintiffs in error contend that the judgment of the State court, based upon the statute, denies to them rights secured by the second section of the Fourth Article of the Constitution of the United States providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," as well as by the first section of the Fourteenth Amendment, declaring that no State shall "deprive any person of life, liberty, or property without due process of law," nor "deny to any person within its jurisdiction the equal protection of the laws." . . .

By the Statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that State. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other States to deal with that corporation. The State did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee or should not transact business with citizens of other States. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of busi-

of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements, and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition."

ness in that State. But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other States from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other States, if they contracted at all with the British corporation, must have done so subject to the onerous condition that if the corporation became insolvent its assets in Tennessee should first be applied to meet its obligations to residents of that State, although liability for its debts and engagements was "to be enforced in the manner provided by the law for the application of the property of natural persons to the payment of their debts, engagements, and contracts." But, clearly, the State could not in that mode secure exclusive privileges to its own citizens in matters of business. If a State should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that State over the claims of individual creditors, citizens of other States, such legislation would be repugnant to the Constitution upon the ground that it withheld from citizens of other States as such, and because they were such, privileges granted to citizens of the State enacting it. Can a different principle apply, as between individual citizens of the several States, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the power to contract with citizens residing in States other than the one in which it is located?

It is an established rule of equity that when a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors (*Graham v. Railroad Co.*, 102 U. S. 148, 161) — not simply of stockholders and creditors residing in a particular State, but all stockholders and creditors of whatever State they may be citizens. In *Wabash, St. Louis &c. Railway Co. v. Ham*, 114 U. S. 587, 594, it was said that the property of a corporation was a trust fund for the payment of its debts, in the sense that when the corporation was lawfully dissolved and all its business wound up, or when it was insolvent, all its creditors were entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. In *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 385, it was observed that a private corporation, when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exists in favor of the creditors of a partnership after becoming insolvent, and that in such case a lien and trust will be enforced by a court of equity in favor of creditors. These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that State, without making any distinction between them. Yet the courts of that State are forbidden, by the statute in question, to recognize the right in equity of

citizens residing in other States to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent foreign corporation lawfully doing business in that State.

We hold such discrimination against citizens of other States to be repugnant to the second section of the Fourth Article of the Constitution of the United States, although, generally speaking, the State has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land. Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States. . . .

As to the plaintiff in error, the Hull Coal & Coke Company of Virginia, different considerations must govern our decision. It has long been settled that, for purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the State creating such corporation; *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 2 How. 497; *Covington Drawbridge Co. v. Shepherd &c.*, 20 How. 227, 232; *Ohio & Miss. Railroad Co. v. Wheeler*, 1 Black, 286, 296; *Steamship Co. v. Tugman*, 106 U. S. 118, 120; *Barrow Steamship Co. v. Kane*, 170 U. S. 100; and therefore it has been said that a corporation is to be deemed, for such purposes, a citizen of the State under whose laws it was organized. But it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." *Paul v. Virginia*, 8 Wall. 168, 178, 179; *Ducat v. Chicago*, 10 Wall. 410, 415; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 573. The Virginia corporation, therefore, cannot invoke that provision for protection against the decree of the State court denying its right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of the British corporation in the hands of the Tennessee court.

Since, however, a corporation is a "person" within the meaning of the Fourteenth Amendment (*Santa Clara County v. Southern Pacific Railroad Co.*, 118 U. S. 394, 396; *Smyth v. Ames*, 169 U. S. 466, 522), may not the Virginia corporation invoke for its protection the clause of the amendment declaring that no State shall deprive any person of property without due process, nor deny to any person within its jurisdiction the equal protection of the laws?

We are of opinion that this question must receive a negative answer. Although this court has adjudged that the prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the State, to its legislative, executive, and judicial authorities (*Ex parte Virginia*, 100 U. S. 339, 346-347; *Yick Wo v. Hopkins*, 118 U. S. 356, 373;

Scott v. McNeal, 154 U. S. 34, 45, and Chicago, Burlington &c. Railroad v. Chicago, 166 U. S. 226, 233), it does not follow that, within the meaning of that amendment, the judgment below deprived the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other States or countries disputed. It was only denied the right to participate upon terms of equality with Tennessee creditors in the distribution of particular assets of another corporation doing business in that State. It had notice of the proceedings in the State court, became a party to those proceedings, and the rights asserted by it were adjudicated. If the Virginia corporation cannot invoke the protection of the second section of Article IV. of the Constitution of the United States relating to the privileges and immunities of citizens in the several States, as its co-plaintiffs in error have done, it is because it is not a citizen within the meaning of that section; and if the state court erred in its decree in reference to that corporation, the latter cannot be said to have been thereby deprived of its property without due process of law within the meaning of the Constitution. It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no State shall "deny to any person within its jurisdiction the equal protection of the laws." That prohibition manifestly relates only to the denial by the State of equal protection to persons "within its jurisdiction." Observe, that the prohibition against the deprivation of property without due process of law is not qualified by the words "within its jurisdiction," while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, "within its jurisdiction," it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that State. Certainly, when the statute in question was enacted the Virginia corporation was not within the jurisdiction of Tennessee. So far as the record discloses, its claim against the Embreeville Company was on account of coke sold and shipped from Virginia to the latter corporation at its place of business in Tennessee. It does not appear to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the amendment, simply by presenting its claim in the State court and thereby becoming a party to this cause. Under

any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the people, nor justified by its language. We adjudge that the statute, so far as it subordinates the claims of private business corporations not within the jurisdiction of the State of Tennessee (although such private corporations may be creditors of a corporation doing business in the State under the authority of that statute), to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the "equal protection of the laws," secured by the Fourteenth Amendment to persons within the jurisdiction of the State, however unjust such a regulation may be deemed.

What may be the effect of the judgment of this court in the present case upon the rights of creditors not residing in the United States, it is not necessary to decide. Those creditors are not before the court on this writ of error.

The final judgment of the Supreme Court of Tennessee must be affirmed as to the Hull Coal & Coke Company, because it did not deny to that corporation any right, privilege, or immunity secured to it by the Constitution of the United States. (Rev. Stat. § 709.) As to the other plaintiffs in error, citizens of Ohio, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.

FULLER, C. J., and BREWER, J., dissenting.

CHIPMAN v. MANUFACTURERS' NATIONAL BANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1892.

[Reported 156 Massachusetts, 147.]

HOLMES, J. The plaintiffs are assignees in insolvency of Dudley Hall & Co. The principal defendant, a national bank doing business in Boston, is a creditor of Dudley Hall & Co. Hall & Co. were adjudged insolvent on March 23, 1891. The assignment to the plaintiffs was made on April 9, 1891. On March 10, 1891, the defendant attached teas in New York in an action there, and it also attached land in Maine in an action there. The teas and the land afterwards were attached by creditors foreign to Massachusetts, upon claims more than sufficient to exhaust the property, so that no part of it or its proceeds will come to the assignees unless the suits are carried on and the defendant's attachments are preserved for their benefit. The object of this suit is to compel the defendant bank to carry on the suits or to allow the plaintiffs to carry them on, the defendant bank of course being indemnified, and to turn over to the plaintiffs whatever may be collected on execution.

Dehon *v.* Foster, 4 Allen, 545, goes further than the English cases in form. *Ex parte* D'Obree, and *Ex parte* Le Mesurier, 8 Ves. 82. But the principle upon which it goes has the same limit as that of the English cases. It is not that the law will prevent a domestic creditor from getting paid in full unless all do. Whatever may be the law where a creditor who has got an advantage abroad seeks to prove under an English commission, the "principle does not apply where that creditor obtains by his diligence something which did not and could not form a part of that fund," "which otherwise would have been available for the payment of all the creditors," at least when he takes no part in the English proceedings. Cockerell *v.* Dickens, 3 Moore P. C. 98, 132; Banco de Portugal *v.* Waddell, 5 App. Cas. 161, 167; Selkrig *v.* Davies, 2 Dow, 230, 249; s. c. 2 Rose, 291.

As the debtor is subject to the jurisdiction of the court, of course it would be possible to make all his property, wherever situated, available for the creditors by compelling him to convey it to the assignees, and a creditor subject to our laws not only might be refused the right to prove unless he surrendered any advantage which he had obtained elsewhere and which otherwise the debtor might have been compelled to convey, but might be compelled by an independent proceeding to make such surrender. That, however, is not what the principle of Dehon *v.* Foster means. It only denies to the creditor the right to retain an advantage in respect of property which by force of the insolvent proceedings, or at least according to the manifest theory of the insolvent law, would have passed to the assignee but for the creditor's act. Dehon *v.* Foster was put on the ground that personal property situated in Pennsylvania, but belonging to a debtor domiciled here, was intended by the statute to pass, and would pass, to his assignee in insolvency. 4 Allen, 545, 552, 554; Selkrig *v.* Davies, 2 Dow, 230, 249; s. c. 2 Rose, 291, 318. A proposition which although it has not commanded unqualified assent (Crapo *v.* Kelly, 16 Wall. 610, 622, and Wharton, Conf. of Laws, § 390 *a*), is law in England (Dicey, Domicil, Rule 63), and which would seem to be sound if assignees in insolvency are to be regarded as successors *per universitatem*, like executors or husbands at common law upon marriage. Royal Bank of Scotland *v.* Cuthbert, 1 Rose, 462, 481; Selkrig *v.* Davies, 2 Dow, 230, 248; s. c. 2 Rose, 291, 317. See Mechanics' Savings Bank *v.* Waite, 150 Mass. 234, 235; Westlake's Priv. Int. Law (3d ed.), pp. 31, 32, 152-157 (§§ 134-140), 185 (§153); Wharton, Conf. of Laws, §§ 553, 555. *Bonorum emptor ficto se herede agit*, Gaius, IV. § 35.

But all the cases agree that an assignment in bankruptcy does not reach foreign lands, and accordingly the reasoning in Dehon *v.* Foster is confined to personal property; and in England it is held that a creditor will not be disturbed in an attachment of such lands, because the principle on which he is interfered with is limited as stated in the language already quoted from the decision. Cockerell *v.* Dickens, *ubi supra*. For the same reason, the bankrupt himself will not be com-

pelled to convey such lands unless the words of the act plainly require it. *Selkrig v. Davies*, 2 Dow, 230, 245 ; s. c. 2 *Rose*, 291, 311, 312.

To a majority of the court it seems to follow that the plaintiffs cannot prevail in the present case even as to the New York teas. The Massachusetts creditor may be prevented from doing anything to hinder the assignment from having the effect which our statutes intend it to have, but that is all. The assignees cannot claim advantages which would not have accrued to them apart from the creditor's action, or found a right simply on the fact that the creditor is within the jurisdiction and so personally subject to the orders of the court. It is not enough to justify a decree to show that the court has the physical power to make it compulsory. Of course the defendant will not be enjoined for the merely negative purpose of preventing it from getting payment, but only to enable the Massachusetts creditors to get the benefit of its attachment. The only ground on which they could claim the benefit of the attachment is the assignment. The assignment is not of the defendant's attachment, but of the property. It would be paramount to the attachment in equity here if there was a conflict and the attachment prevented the assignees from getting the property, but the attachment is not what prevents their getting the property, since the other attachments will do that even if this one should be declared void. It would be going beyond the intended scope of the assignment to treat it as substituting the assignees to the benefit of attachments outside of the State which they do not desire to vacate. Pub. Sts. c. 157, § 47, on its face is only intended to apply to proceedings in this State. *Bill dismissed.*¹

BATCHELLER v. NATIONAL BANK OF THE REPUBLIC.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1892.

[Reported 157 *Massachusetts*, 33.]

MORTON, J. These cases were reserved by a single justice, on the bills, answers, and agreed facts, for the full court. We do not propose to consider whether the plaintiffs have a *locus standi* in either case. We assume for the purposes of these cases that they have. The cases relate to the right of the defendant to prove two notes in insolvency against the estate of the plaintiffs, Alfred H. and Francis Batcheller, who were formerly partners as E. & A. H. Batcheller and Company. They are a part of six notes originally held by the defendant against the firm. A question as to the right of the defendant to retain as against the assignees in insolvency of the firm the proceeds of four of

¹ See *Jenks v. Ludden*, 34 Minn. 482, 27 N. W. 188; *Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73; *Crippen v. Rogers*, 67 N. H. 207, 30 Atl. 346. — Ed.

them was before this court in *Proctor v. National Bank of the Republic*, 152 Mass. 223, and was decided in favor of the defendant. In that case it was said that the bill could not be maintained for the purpose of enjoining the defendant from proving against the estate in insolvency of said firm the notes which it still held, — which are the two now before us, — or of deciding the terms on which, if at all, such notes might be proved, because the bill was not brought under the Pub. Sts. c. 157, § 15; and that, if the defendant intended to offer the notes for proof, it was for the court of insolvency to pass upon the allowance of them before the supervisory power of this court could be invoked. The notes have since been offered in proof, and have been allowed by the insolvency court. The plaintiffs now pray that said proof may be expunged unconditionally, or that it may be expunged unless the defendant will pay into the insolvency court or to the plaintiffs the money received from the notes aforesaid, or that the defendant may be enjoined from collecting on said notes more than, with what it has already received as the proceeds of the four notes, will amount to seventy-five per cent of the six notes.

It is only necessary to consider the facts so far as they relate to the cases now presented. It appears that said firm was in September, 1889, adjudged insolvent on its own petition, and that at the same time it filed a proposal to pay in composition to its creditors all debts and claims in full that were entitled to priority, and seventy-five per cent on all other claims. This was duly confirmed by the insolvency court, and the full amount required for its immediate payment in cash was deposited in court within the time limited therefor, and the said Batchellers were duly discharged from all firm debts. The assignees thereupon, in accordance with an order of the insolvency court, conveyed to said Batchellers all their right, title, and interest in and to their joint estate, except the debt of over \$20,000 due from Simkinson and Company of Cincinnati in the State of Ohio, and the suit then pending in favor of the assignees against the defendant, which is the one above referred to. The funds necessary to carry out the composition were advanced by the plaintiff Proctor, and to secure him as far as possible a mortgage on this property was given to him by the plaintiffs Batcheller, and by a sale of it and otherwise a part of said advance has been repaid, but a part still remains unpaid. To secure him still further, the plaintiffs Batcheller made in August, 1890, an assignment to him of all moneys deposited as aforesaid in the insolvency court which should remain there on October 20, 1890. The answer in each case alleges, and it must be taken as true, that after the payment of the balance due to Mr. Proctor there will be a surplus. If, therefore, either of the prayers of the plaintiff should be granted in either case, the other creditors of the firm will not be benefited, for they have all received their percentage, and the debtors have been discharged. Mr. Proctor will be not benefited, for his security is already more than sufficient to pay the balance due him. The result will be to increase, at the

cost of the defendant, the amount which the debtors will themselves finally realize. For even if it should receive seventy-five per cent on the two notes, the defendant will not thereby obtain payment in full of all its notes. We have been referred to no case in which the principle of equality of distribution, which the plaintiffs rightly contend forms the basis of insolvency proceedings, has been carried so far.

The English courts hold that a commission in bankruptcy passes the title to the personal property of the bankrupt wherever it is situated; and, therefore, if a foreign creditor, who has, after the issuing of the commission obtained by attachment or other legal proceedings, payment in part of his claim out of personal property of the bankrupt, seeks to share with English creditors in the distribution of the bankrupt estate, and to prove in the English bankruptcy court for the balance of his claim, that he should before being allowed to do so account for what he has thus received. For the same reason, if an English creditor obtains in a foreign jurisdiction payment of part of his claim by proceedings begun after the commission in bankruptcy was issued, he will not only be obliged to account for what he has received before he will be allowed to share with other creditors in the bankrupt estate, and to prove for the balance of his claim, but will be liable to the assignees for the amount so received. *Sill v. Worswick*, 1 H. Bl. 665; *Hunter v. Potts*, 4 T. R. 182; *M'Intosh v. Ogilvie*, 4 T. R. 193 n; *Ex parte D'Obree*, and *Ex parte Le Mesurier*, 8 Ves. 82; *Solomons v. Ross*, 1 H. Bl. 131, n; *Jollet v. Deponthieu*, 1 H. Bl. 132, n; *Neale v. Cottingham*, 1 H. Bl. 133, n; *Phillips v. Hunter*, 2 H. Bl. 402; *Selkrig v. Davies*, 2 Dow, 230, and 2 Rose, 291; *Cockerell v. Dickens*, 3 Moore, P. C. 98. *In re Bugbee*, 9 Nat. Bank. Reg. 258, might well stand on the ground thus indicated, which has much in reason to commend it.

On the other hand, it is held in England that if either the foreign or the domestic creditor has obtained his payment out of property which would not pass under the commission in bankruptcy, as, for instance, real estate in a foreign jurisdiction, or if the attachment was made before the commission issued, then he will not be obliged to account, but will be permitted to prove unconditionally for the balance of his claim. Cases *supra*. That is, as we understand it, the principle of the English cases is that a domestic creditor who has obtained payment in part of his claim out of property of the debtor in a foreign jurisdiction for which he would not be accountable to the assignee, will be allowed to prove the balance of his claim without being compelled to account for what he may have thus received. We are of opinion that this principle applies to the case at bar. In *Proctor v. National Bank of the Republic*, *ubi supra*, this court held that the defendant was not accountable to the assignee for the proceeds of the sale of the other notes, and that it could properly and lawfully retain them as against the assignee. To require it now to account for them would be in effect to compel

it to account to the plaintiffs, who are the successors of the assignees, for that to which it was there held the assignees had no claim. See also *Chipman v. Manufacturers' National Bank*, 156 Mass. 147.

We think the proof was rightfully allowed, and that the

Petitions must be dismissed.

A. v. B.

SUPREME COURT OF AUSTRIA. 1877.

[*Reported 15 Sammlung von Civilrechtlichen Entscheidungen*, 83.]

ON the 11th of February, 1877, proceedings in bankruptcy were instituted in the Commercial Court of Buda-Pesth against the firm of Ferdinand B., there registered; and accordingly an inventory of the movables of the firm in Vienna was filed in the Commercial Court of Vienna, where also the firm was registered, but not as a subordinate branch. On February 16, 1877, A., a creditor of the firm, petitioned in the Commercial Court of Vienna for the administration in bankruptcy of the property of the firm, according to section 198 of the Commercial Code, alleging that the debtor was registered in the Commercial Court of Vienna, and had his usual residence there, and if the administration of the estate was confined to the Commercial Court of Buda-Pesth the numerous and most interested Austrian creditors would be under the necessity of proving their claims at Buda-Pesth and seeking payment from the estate, which would be most inconvenient.

Upon this petition, laying section 60 of the Commercial Code out of the case, and with reference solely to section 193 of the Code, since a mercantile estate is concerned, the Commercial Court of Vienna undertook the administration of the entire movable property, wherever found, of the banker and commission-merchant, Ferdinand B., registered under the firm name Ferdinand B., and of his immovable property situated within the jurisdiction of the Commercial Code, so notified the Commercial Court of Buda-Pesth, and denied to the Court of Bankruptcy of Buda-Pesth possession of the entire bankrupt estate situated in Vienna.

The assignee in bankruptcy appointed in Buda-Pesth and the bankrupt appealed. The Court of Appeal affirmed the decision of the Commercial Court of Vienna.¹ The assignee appealed to the Supreme Court. The Supreme Court held that the administration of the entire estate, undertaken by the Commercial Court of Vienna, should be limited to the property outside the dominions of the Hungarian Crown.

¹ The opinion of the Court of Appeal and the argument of the appellant in the Supreme Court are omitted. — ED.

THE COURT. By section 193 of the Commercial Code of December 25, 1868, a bankrupt mercantile estate is to be taken and administered by the court having commercial jurisdiction in the district where the bankrupt had his domicile. From this universal rule it follows, that since only the registration of the firm and the domicile is decisive, only one Commercial Court is designated which has jurisdiction to act in the administration of the estate. This construction is moreover supported by the considerations that the action of such a court is necessarily required in the interest of the domestic creditors, and provisions are found in the statute which are conditioned upon the action of such a Commercial Court and are only possible through such action. The Commercial Court of Vienna therefore has jurisdiction to administer the estate. But since on February 11, 1877, the Commercial Court of Buda-Pesth undertook the administration in bankruptcy of all the movable property of the firm Ferdinand B. situated within the dominions of the Hungarian Crown, and according to section 11 of Article 22 of the Acts of the year 1840, and section 1 of part IV. of the Decree of the *Judex-Curial*, in cases where bankruptcy is declared both in a Hungarian and in a foreign court the jurisdiction of the latter with regard to the universal property is confined to the movable property situated outside Hungary, but the administration in bankruptcy is undertaken by the Commercial Court of Vienna for the movable property of Ferdinand B. wherever situated, the decision of the lower court will be affirmed with the partial correction, that only the movable property situated outside the dominions of the Hungarian Crown shall be administered.

PIAGGIO v. DACIER.

COURT OF CASSATION, TURIN, 1884.

[*Reported 19 Annali della Giurisprudenza Italiana*, 1, 360.]

PIAGGIO & Son except to the permission to the syndics Mauraille, Guichard, and Dacier to stand in judgment in this kingdom as representatives of the rights of E. Brett in liquidation, because they have not secured executory force for the decree of the Tribunal of Commerce of Marseilles of January 9, 1879, by which they were appointed to administer and liquidate his property, which decree was produced by them in this case without the previous investigation of the merits required by Article 941 of the Code of Civil Procedure.

The sentence appealed from examined the nature, object, and scope of his decree, held that it required the mere approval by the court of the appointment in the case of Brett in composition with his creditors of Mauraille, Guichard, and Dacier to administer and liquidate his

affairs, and that it was therefore a question of a simple judicial mandate; and in fine, for this reason, it adjudged that the decree in question did not need to be subjected to an examination on the merits in order to be produced in the courts of this kingdom by the liquidators for the mere purpose of proving their quality as representatives of the mercantile house of Brett.

In so holding the court did not transgress any article of the Fundamental Statute of the kingdom, but correctly interpreted and applied the special provisions applicable, contained in title 12, book 3, of the Code of Civil Procedure. In fact, from the context and from the literal provisions of this title, compared with Article 559, the court well said that a judgment needed to be rendered executory in the kingdom after full investigation of the merits only if some consequence is to follow from it; now when the only question is of standing in judgment as syndic, the decree produced to prove the appointment, even if it emanates from a foreign authority, does not need an investigation of the merits.

Jurisprudence always recognizes the distinction, which should be made in every case in the application of the law cited, between the executory force of an act and its legal existence, as is found distinctly in the same law, which in requiring investigation of the merits always refers to the executory force of acts. Reason and authority alike prove it. To give executory force to a decree or any foreign act the courts of a country must necessarily intervene and exercise the power of government; while on the other hand when the intervention of power, of the arm of local authority, is not required, the foreign judgment may exist and produce its effects, the authentic act have probative value, without the necessity of any authorization or investigation of the merits.

The judgment appealed from having proceeded upon these legal principles, it escapes adverse criticism in this respect. For these reasons,

Appeal rejected.

STEIN v. TILLOT.

COURT OF BORDEAUX. 1885.

[*Reported Dalloz*, 1888, 2, 290.]

THE COURT. According to Article 15 of the Civil Code, a Frenchman may be sued in a French court, even by a foreigner, upon an obligation contracted abroad. It is therefore of no importance that the proceedings against Tillot in this case were instituted by a foreigner. The right of suing in a French court for payment of a commercial debt necessarily implies that of applying for a declaration of bankruptcy, which is only the method of proceeding upon default

of the payment by a merchant of his commercial debts. When a debtor thus sued has no domicile or usual residence in France, the suit should be brought before the tribunal of the place where he has an established place of business, in which he has agents to represent him and a stock of merchandise for business purposes. Such was the situation of Tillot at Bordeaux, where he was represented by a manager who had the care of his interests, and where, at the time proceedings were instituted in the Tribunal of Commerce of that city, he had merchandise of various sorts worth more than 43,000 francs.

On the other side it is proved that Stein Brothers were creditors of Tillot to the amount of 3,629 francs for the sale of merchandise for which they had never been paid; many creditors have failed to obtain satisfaction, and the cessation of payments by Tillot is absolute, as he admitted himself by applying to the court of bankruptcy. It is of no importance that Tillot, the appellants allege, was declared bankrupt in the island of Guernsey. In the absence of a treaty, this judgment could be executed in France only after an examination on the merits, in conformity with Articles 2123 and 2128 of the Civil Code and 546 of the Code of Procedure.

GERSON *v.* OZERÉ.

COURT OF PARIS. 1886.

[*Reported Dalloz*, 1888, 2, 291.]

THE COURT. The documents produced to the court show that Gerson, an American citizen, carried on business at Paris as a commission merchant, with an office and store distinct from his dwelling-house at 32 Rue de Paradis-Poissonnière, where he engaged in the business of buying merchandise for resale. In April, 1885, he gave up this establishment, leaving a liability of more than 20,000 francs, mostly made up of mercantile debts. The judicial proceedings which, the appellant says, have been carried out in the United States of America as a result of his failure in that country, offer no obstacle to a declaration of his bankruptcy in France, the seat of his business, for the security of the rights of French creditors who have dealt with him.

*Appeal dismissed.*¹

¹ *Acc.* 12 *Clunet* 178 (Orleans, 27 Mar. '85). — Ed.

SYNDIC OF MÉZIÈRES v. BANK OF ALSACE AND
LORRAINE.

COURT OF NANCY. 1887.

[Reported *Dalloz*, 1887, 2, 289.]

MÉZIÈRES, banker at Blâmont (Meurthe-et-Moselle) had three business branches in Alsace-Lorraine, and his bankruptcy was decreed abroad on August 11, 1886, as it had been in France on the 9th of the same month. Two syndics were named and two estates created, each with its own assets and liabilities. Stieve, syndic of the bankruptcy in Alsace-Lorraine, sued for the recovery of a debt due to the Sarrebourg branch by the branch at Nancy of the Bank of Alsace-Lorraine, which has its principal establishment at Strasbourg. He is competent to bring this suit, even though the decree appointing him has not been declared executory in France. It is not a question of giving to this judgment effects for which Article 546 of the Code of Civil Procedure declares an *exequatur* necessary, but only (according to the rule *locus regit actum*) of establishing the existence of a fact, namely, the appointment of Stieve as syndic of a bankruptcy and the legal mandate confided to him of getting in the assets. The Tribunal of Commerce of Nancy, place of location of the defendant's bank, was competent to pass upon the suit brought by Stieve, since the object of the suit did not directly concern the administration of the bankruptcy; and the Tribunal of Lunéville, within the district of which the bankruptcy had been decreed in France, had no jurisdiction.

The judgment being set aside, the court is empowered to pass upon the merits, by application of Article 473 of the Code of Civil Procedure, since the cause is ripe for judgment. It makes no difference that the disputed jurisdiction of the judges of first instance was final; for Article 473, already cited, makes no distinction, and the determination is required, in this case, in the interest of celerity and of economy.

Mézières having been declared bankrupt both in France and abroad, his creditors are referred to one of two estates, according as they have dealt with the French house or the branch in Lorraine. Each of these estates, represented by a syndic, is administered as to its assets and liabilities according to the proofs in his possession. Stieve finds in the account current opened by the branch of the Bank of Alsace-Lorraine with the Sarrebourg house, and closed August 10, 1886, as a result of the bankruptcy, a balance due of 1,135 fr. 26 cent., for the recovery of which, with interest since accrued, he brings suit. The defendant bank in vain claims to set off against this debt the balance in its favor of another account current opened with the Blâmont house, and intended by the common consent of the bankrupt and the bank of Alsace-Lorraine to apply to operations distinct from

those undertaken with the Sarrebourg house; since by the terms of Article 446 of the Code of Commerce a set-off ceased to be possible from the moment when the double bankruptcy closed both accounts and fixed a balance due to or by the two distinct estates.

For these reasons the court permits the appeal of Stieve as syndic from the judgment of the Tribunal of Commerce of Nancy of February 18, 1887; declares that the tribunal was competent to entertain the suit which had been regularly brought; and upon the merits condemns the bank of Alsace-Lorraine to pay to Stieve the sum of 1,135 fr. 26 cent., for the reasons set out in this judgment, with interest at 6 per cent since August 10, 1886.

WELLS v. BANK OF CHRISTIANIA.

SUPREME COURT OF NORWAY. 1887.

[*Reported 16 Clunet, 920.*]

WELLS, an Englishman, was engaged in the lumber business both in England and at Porsgrund in Norway. Having several important bills to pay, he entered into an agreement with two of his creditors at Christiania, December 8, 1881, by the terms of which his property in Norway was assigned to a third party to take it, turn it into money, and give half the proceeds to the two Norwegian creditors. Wells returned to England, and was there declared bankrupt, December 12, 1881, by the Bankruptcy Court of Yorkshire. The Bankruptcy Court of Porsgrund was petitioned by Wells, December 31, to take and administer his Norwegian property in bankruptcy; this petition was not granted. A new petition, received February 2 from the English syndic, was granted. The Bankruptcy Court of Porsgrund then proceeded against the two Norwegian creditors for an avoidance of the agreement of December 8, 1881, and for the amount already realized from a sale of the property. The Supreme Court at Christiania gave judgment against the creditors.

THE COURT. The agreement in question is subject to Articles 44 and 45 of the Norwegian law of bankruptcy. Though the creditors were to receive the money realized from the property at all events, yet the agreement is an abnormal mode of payment which is made void by the law of bankruptcy. Even if the law of bankruptcy were inapplicable, the agreement would be void by application of the Norwegian Code, 5, 13, 44, for the two creditors were attempting thus to procure a preference over the other creditors, knowing the debtor to be insolvent; in fact, one of them had tried to put him into bankruptcy.

In the second place, the declaration of bankruptcy in England produces its effects in Norway and extends to property situated in

this country. Therefore the declaration made in England on December 12, might be taken as the *dies ad quem* of the eight weeks preceding the bankruptcy, which according to the Norwegian law of bankruptcy forms the term during which conveyances are voidable. Besides, no Norwegian Court has jurisdiction to put into bankruptcy this debtor's property. According to the ordinance of June 21, 1793, Article 1, bankruptcy proceedings should be undertaken by the court in the personal forum of the debtor. Since there is no such forum in Norway, the bankruptcy cannot be instituted in a Norwegian court, but by the foreign court of the domicile.

Finally, the period of eight weeks is to be counted from day to day, not from hour to hour.¹

KLINGSLAND v. TOM.

HIGH COURT OF THE NETHERLANDS. 1888.

[*Reported Nederlandsche Rechtspraak*, 1888, 344.]

THE plaintiff is the holder of a bill of exchange accepted by the firm of C. & J. Tom of Warsaw whilst the defendant was a member of the now dissolved firm. The plaintiff as holder of the bill proved it in the bankruptcy, and obtained a dividend of 10 per cent. The defendant, who some years ago settled in Amsterdam, was legally sued on the 24th of December, 1887, for the balance of 90 per cent remaining unpaid. The plaintiff further claimed, and the defendant did not deny, that the latter had entered into the business of merchant at Amsterdam, which must be regarded as a hostile position. The plaintiff, not having received payment of the balance due on the bill, demanded that the defendant be declared a bankrupt. The lower court refused to declare the defendant in a state of bankruptcy, partly because it should be proved, as had not been done, that the plaintiff who lived at Warsaw and by the proof of his claim in the bankruptcy had subjected himself to the forced equality of the *concursum creditorum* and to the legal results in that place, had the right (contrary to the provisions of the law of the Netherlands) to demand payment of the remaining 90 per cent of the bill from the individual partner; and partly because the defendant, member of the firm of J. & C. Tom, had already stopped payment before the time of the declaration of

¹ The question whether the assignee or syndic of a bankrupt, appointed at his domicile, has a right to the movable property of the bankrupt everywhere is undecided in countries governed by the Civil Law. That he has, see *Selkrig v. Davies*, 2 Dow, 230; *Re Howse*, 3 Juta, 14; *Perrin v. Turton*, 1 Transv. Prov. 25; 22 Clunet, 157 (Austria, 12 Apr. '93); 26 Clunet, 867 (Milan, 14 Dec. '91). That he has not, see 14 Clunet, 243 (Netherlands, 16 March, '85); 15 Clunet, 126 (Austria, 11 June, '84); 24 Clunet, 420 (Arnheim, 29 April, '95); 26 Clunet, 867 (Genoa, 25 March, '92).—Ed.

bankruptcy at Warsaw, and accordingly could not stop payment again at Amsterdam on the 24th of December, 1887.

The Court of Appeal affirmed the decision; and the plaintiff appealed from this judgment to the High Court of the Netherlands.

THE COURT. The decision depends upon whether a bankruptcy pronounced abroad has the same legal results as one pronounced in this country.

The decision of the lower court, that according to the law of the Netherlands the payment by the individual partner of the 90 per cent of the bill still remaining unpaid could not be required, and the decision that owing to the fact that the defendant in 1881 had defaulted in the payment of the whole bill it was impossible to have a new default in payment of part of the bill in 1887, depended upon the hypothesis that the obligation which the defendant had in this country with respect to his debts had been determined by the bankruptcy pronounced at Warsaw in 1881. This hypothesis is unsound. Bankruptcy, being a universal seizure, by judicial decree, of the goods of the debtor, can take effect no further than the jurisdiction of the judge who issues the decree extends. It would be opposed to the independence of the various States if it were possible thereby to hinder foreign judges from taking similar measures when otherwise both competency and occasion for them exist.

CHALE v. ARTOLA.

COURT OF CASSATION, SPAIN. 1894.

[*Reported 75 Revista General, Jurisprudencia Civil, 693.*]

D. JOSÉ MARÍA, D. Jorge, D. Ramón, D. Daniel, and D. Francisco Artola formed on March 19, 1885, in accordance with the French law, a collective commercial association, located at Paris, under the firm name of Artola Brothers, for the term of five years, ending December 31, 1889. The partners were themselves to carry on the business with full powers to use the firm name and to act in all interests of the partnership.

On December 11, 1889, the Tribunal of Commerce of the Seine declared the partnership bankrupt, fixed the date of cessation of payment provisionally at the same date, and named as temporary syndics D. Andrés Julio Chale and D. Alejo Dronín, who were continued as permanent syndics by a judgment of November 24, 1891. In the same court Artola Brothers on December 13, 1889, filed a schedule, including among the assets the copper and cobalt mine called "Profunda," situated in the province of Leon, which was then in litigation in the lower courts on their claim to two-thirds of it, and an appeal pending; the net value of the two-thirds was at least five hundred thousand francs

a year. By sentence of the Tribunal of Assizes of Paris, March 31, 1892, all five brothers Artola were in their absence adjudged guilty of fraudulent bankruptcy, and each, being in contempt, was sentenced to ten years' hard labor.

On the 26th of October, 1889, the brothers Artola claiming to form the mercantile partnership, represented by J. M. Artola in liquidation, appeared in the court of first instance of San Sebastian, praying to be declared in a state of suspension of payment, and accordingly presented a proposition for a composition. D. Andrés Julio Chale as syndic of the bankruptcy in Paris, intervened, alleging the bankruptcy there declared and the schedule filed, protested against the proposed composition, and moved that notice of his protest should be given to the creditors. This motion was denied because D. Andrés Julio Chale did not figure in the list of creditors; and a composition was approved in which it was stipulated that its execution should be secured by the movable property in Spain and by the two-thirds interest in the mine "Profunda," which, pending the decision of the appeal, was to be taken as the property of the brothers Artola.

D. José María and D. Daniel Artola individually had brought suit against D. Ruperto Sanz to recover two-thirds of the mine "Profunda." By sentence of the court of Valladolid, October 23, 1889, the latter was ordered to execute in favor of the demandants a public deed in the terms contained in a certain private document in which he released to each of these brothers one-third interest in said mine and its appurtenances, and upon appeal by D. Ruperto Sanz the judgment was affirmed November 20, 1890. Meanwhile D. Andrés Julio Chale and D. Alejo Dronín filed an intervening petition in which they alleged that the personality of the brothers Artola had terminated by virtue of the bankruptcy decreed in France, and that the syndic who represented this bankruptcy should be substituted in their place. The Supreme Court declared that they had no standing because D. José María and D. Daniel Artola were suing in their own proper right and not as partners in the firm; and since the bankruptcy decreed was that of the partnership and not of any one of the partners, their capacity and personality to carry on suit was unaffected.

On October 2, 1891, D. Andrés Chale and D. Alejo Dronín as syndics named by the Tribunal of Commerce of the Seine for the bankruptcy of the partnership Artola Brothers, domiciled in Paris, jointly brought suit, in the court of first instance of San Sebastian against D. Jorge and D. Francisco Artola as active partners in the firm Artola Brothers and against the parties to the composition made between Artola Brothers and the creditors of D. José María Artola in liquidation, praying to have declared null and of no validity or effect this composition and all acts and contracts made by the defendants in execution and fulfilment of the same, and to have all things restored to the condition in which they were before the composition was entered into, and for the payment of damages and costs. Dilatory

exceptions having been opposed to this demand, an appeal was taken to the court of Pamplona.

The same D. Andrés Julio Chale and D. Alejo Dronín as syndics of the bankruptcy of the partnership Artola Brothers, domiciled at Paris, brought in the court of first instance of La Vicella on March 17, 1892, the suit in which the present appeal is taken; and reciting the facts which have been stated, alleged as the basis of their claim that the legal capacity of persons is governed by the law of their country, and consequently that of the partnership Artola Brothers, domiciled at Paris, and that of the partners who constitute the firm, must be subject to the laws of that republic and to the declaration of its courts and must be governed by them. The decision of this Supreme Court in not admitting the petition of these syndics in the suit for the share of the mine "Profunda" offered, they argued, no obstacle to the present suit; for that was with reference to acts and contracts made before the decree of bankruptcy, and subsequently an important fact occurred, which was the individual decree of bankruptcy of each one of the partners who formed the partnership. One could not say that the syndics had no standing before the Spanish courts until they had obtained an *exequatur* of the decree in bankruptcy; for it was not a question of executing in Spain a judgment of a foreign court, but, on the contrary, of calling for a decree of the Spanish courts in a case where they appeared as representing a foreign juridical entity which, according to the treaty made with France, January 7, 1862, might bring suit in the Spanish courts on the same terms as Spanish citizens. Wherefore they prayed for a decree, first that everything that had been done in the suit brought by D. José María and D. Daniel Artola against D. Ruperto Sanz for a release of two-thirds of the mine "Profunda" and its profits and appurtenances and all acts done in fulfilment of the sentence of this Supreme Court given in that suit should be declared null and of no effect whatever, since the partnership Artola Brothers was declared in bankruptcy; declaring equally null all payments, acts, and contracts made by these parties with respect to the rights declared by the judgment, leaving, therefore, without effect the proceedings, the order of court of March 2, 1891, the settlement of accounts made with Sanz and the payment of the balance due, and secondly that the goods and rights which by virtue of this sentence were decreed to the Brothers Artola should be subjected to the liabilities contracted by them as partners in the firm Artola Brothers; condemning the defendants to take all the measures agreed upon to carry out this decree, to deliver to the plaintiffs all the property referred to in the suit, the income realized from the same, or which may be realized in the future, and to pay damages, with costs, against those opposing the demand.

In opposition to these demands D. José María and D. Daniel Artola appeared and set up in the first place a plea of lack of jurisdiction based on section 1 of Article 53 of the law of Civil Procedure; that the suit was for the execution of the judgment of a foreign court which it

was attempted to enforce in Spain with respect to persons and property there, contrary to the decisions of our own court. To grant the petition necessarily involved the decision of whether or not this judgment was admissible in Spain, and whether or not it had produced effects in this country, which was a matter within the exclusive jurisdiction of the Supreme Court and hence outside that of the court of La Vecilla. This latter court cannot determine the claims of the plaintiffs, for their arguments show that nothing is in question but the enforcement of the declaration of bankruptcy decreed by the French court; although the fact of such declaration is proved in order to indicate the juridical situation in which by virtue of it were placed in Spain, in conformity with the Spanish law, the brothers Artola, their goods in this country, and the validity or nullity of the acts and results in the Spanish courts. The Supreme Court cannot allow this without departing from their preceding decision. The claim of the French syndics, whatever be the form in which it is stated, amounts to determining the effects produced in Spain by the bankruptcy declared by the French tribunals; to making such a declaration of bankruptcy effectual with respect to persons and property in Spain contrary to the decisions of our own courts. Nothing which is asked in this claim can be granted without as a result admitting in Spain the judgment of the French court, — a thing which it is not within the competence of an inferior court to do. Such a court should so decide, declining cognizance of the matter and leaving it to the determination of the Supreme Court.

The second exception of the Brothers Artola was that of personality, based on the decision of this Supreme Court; the third, that of *lis pendens*, setting up the suit pending in the Court of San Sebastian; and finally defect in form of the statement of claim, which had not stated the form of action which was instituted. They prayed that these exceptions should be allowed, and that consequently the claim should be dismissed, with costs.¹

The Civil Chamber of the court of Valladolid having on October 30, 1893, affirmed the judgment, with costs, against the appellants D. Andrés Julio Chale and D. Alejo Dronín, they appealed, in their capacity as syndics named by the Tribunal of Commerce of the Seine for the bankrupt firm of Artola Brothers, domiciled at Paris, with branches at London and elsewhere. The reasons of appeal were: —

First: Article 2 of the Treaty with France of January 7, 1862, having force of law in Spain, which authorizes the subjects of each country to have free access to the courts of the respective countries to sue in defence of a legal right (a provision in harmony with Article 32 of the Royal Decree of November 17, 1852) was infringed by the dismissal of an ordinary civil suit brought in the Spanish courts for the enforcement of civil rights by the legitimate representatives of a moral

¹ The argument for the petitioners in this court is omitted. — ED.

entity, constituting a French juridical person, to wit a bankruptcy of a commercial establishment formed and domiciled in Paris by the laws of that nation; and by the denial to these representatives who were syndics in bankruptcy, the right of being heard before the native courts in order to nullify acts and contracts done in Spain by the bankrupts. It could not be supposed that in passing on such a claim an *exequatur* was necessary, nor in any way could a question of extraterritoriality arise which could threaten or diminish the sovereignty and independence of Spain. Although the decree of the Tribunal of Commerce of the Seine, declaring the bankruptcy and naming the syndics, was invoked by the petitioners, it was not asked that these decrees should be executed in Spain; it was averred only as an existing fact which proved first the quality of the petitioners, and second the personal incapacity with which the defendants, the bankrupts Artola, were affected in their juridical relations in Spain. Though it was true the petitioners claimed a declaration by the Spanish courts not only that the defendants' acts were void, but also that they themselves were entitled to the property conveyed away by the brothers Artola, this did not involve the execution of the decree of a foreign court, but the enforcement of a pre-existing right of the creditors against the bankrupts; creditors who in default of capacity of the firm Artola Brothers, affected with the juridical status of bankruptcy by the decree of the French courts, were represented by the petitioners, the syndics.

Second: The decision denied the jurisdiction of the Spanish courts to recognize the juridical capacity of a partnership formed in France, a capacity proved by the laws and judicial decisions of that nation, and therefrom to determine the efficacy of the acts done by the partners in Spain with relation to the partnership property there; a denial based on the aforesaid erroneous supposition that the subject-matter of the litigation was beyond the jurisdiction of the Spanish courts, whereas, it being a question of the declaration or the denial of civil rights over property situated and acts done in Spain, it was for the courts of the country exclusively to entertain and determine the litigation without the necessity of previous proceedings to obtain an *exequatur*. This decision infringes the legal doctrine, established by the jurisprudence of this Supreme Court in its decisions of January 13 and May 12, 1885, and May 26, 1887, that his own status and capacity accompany a foreigner, and that the laws of his country should be applied in order to avoid the inconveniences of not judging him by a single law, and consequently that there is no need of obtaining an *exequatur* for judicial declarations of status. This doctrine is even stronger because it lies at the foundation of the provisions of Article 9 of the Civil Code and Article 15 of the Code of Commerce, also infringed by the judgment appealed from; the first of which provides that Spaniards are bound, even when residing abroad, by the laws relating to status, condition, and legal capacity; and the second ordains that foreigners and associations formed in foreign countries may carry on commerce in

Spain, subject to the laws of their own country with regard to their capacity to contract.

GULLÓN, J. Article 2 of the Treaty with France of January 7, 1862, and Article 32 of the Royal Decree of November 17, 1852, cited in the first reason for appeal, are inapplicable, and could not be infringed, for the judgment did not pass upon the capacity of the petitioners, nor deny their quality as syndics of the commercial partnership Artola Brothers, nor did it deny the free access which Frenchmen are entitled to have to the Spanish courts; it was limited to declaring, for the reasons expressed in it, the incompetence of the court of La Vecilla because of the necessity, created by the nature of the claim, of previously obtaining the authorization of this Supreme Court. Neither is the second reason for appeal to be considered, though the principle laid down is clear; it is not applicable to the present case, because the prayer of the petition implies, as the judgment clearly points out, the recognition and execution in our country of the declaration of bankruptcy of the firm Artola Brothers, by decree of the Tribunal of Commerce of the Seine. This decree requires, in order to be carried out in Spain, the grant of an *exequatur* by this court.

We adjudge that we ought to decree and we do decree that there is no cause for the appeal of D. Andrés Julio Chale and D. Alejo Dronín, as syndics of the bankruptcy of the firm Artola Brothers; we condemn them to lose the security deposited, which will be distributed according to law, and to pay costs, and transmit to the court of Valladolid a rescript to this effect.

SECTION IV.

ESTATES IN THE HANDS OF RECEIVERS.

ANON. v. LYNDSEY.

CHANCERY. 1808.

[Reported 15 Vesey junior, 91.]

A MOTION was made for the appointment of a receiver upon an estate in the East Indies.

The LORD CHANCELLOR [LORD ELDON], granting the motion, said, the rents should be remitted to some person in England, who may pay them into the bank.

Sir Samuel Romilly, in support of the motion, suggested that as a receiver in India would be out of the jurisdiction, some person in this country should be the receiver, who might appoint his own agent in India.

The LORD CHANCELLOR approved that course, and said, there must

be some provision to prevent the necessity of applying to the court from time to time for permission to let.

A reference was accordingly directed to the Master to inquire what should be the term beyond which the receiver should not be permitted to let.¹

LANGFORD v. LANGFORD.

ROLLS COURT, CHANCERY. 1835.

[*Reported 5 Law Journal, New Series, Chancery, 60.*]

LORD LANGFORD, the defendant in this cause, had executed a settlement by which he charged his Irish estates in favor of the plaintiff, Lady Langford, with the payment of an annuity during her life. The annuity fell into arrear, and the defendant being in England, Lady Langford instituted this suit for an account and a receiver. The defendant resisted a motion for a receiver, on the ground that there were incumbrances prior to the annuity; but in July, 1835, the Master of the Rolls ordered a receiver, who was appointed in October. The order appointing the receiver was duly served on the tenants, with a notice to pay the rents to such receiver, and which they were willing to do. Mr. Murphy, the agent of the defendant, however, served notices on the tenants, to the effect "that the order recently served upon them, as made by the English Court of Chancery, was of no force or effect in Ireland, and that, notwithstanding the service of the said order, his Lordship would require, and if necessary enforce, payment of his rents as heretofore." The defendant, Lord Langford, by his affidavit stated that he had given no authority whatever to his agents in Ireland to demand payment of the rents of the said estate, or to distrain upon the tenants of the said estate; but he admitted that he had instructed his solicitor in Ireland, after giving him notice of the said order made by this court, to oppose, as far as the law would permit, the receivers of such rents and profits from receiving the same. The result of these proceedings was, that the English receiver was unable to obtain payment of any of the rents.²

Mr. Pemberton and *Mr. Bethel* now moved on behalf of the plaintiff, that a commission of sequestration might issue, to sequester the personal estate and the rents and property of the real estate of the defendant, Lord Langford, for the contempt.

Mr. Bickersteth, contra.

¹ A receiver was appointed to take charge of an estate abroad, in the following cases: *Davis v. Barrett*, 13 L. J. N. S. Ch. 304 (real estate in West Indies); *Hinton v. Galli*, 24 L. J. Ch. 121 (real and personal estate in Italy: unopposed). *Contra*, *Kittel v. Augusta*, T. & G. R. R., 78 Fed. 855; *Harvey v. Varney*, 104 Mass. 436. — Ed.

² The statement of facts is slightly condensed. — Ed.

PEPYS, M. R. That this is a contempt I have no doubt. It is true that this court has not the means of sending its officers to carry into effect its orders in Ireland; but it has jurisdiction over all persons in this country, and can compel obedience to its orders. The defendant sends to his solicitors in Ireland to oppose by all lawful means the receiver appointed by this court from receiving the rents. If he meant, by all lawful means in this country, there should be no resistance at all; because a party is not justified in opposing the order of the court; but he says, by all lawful means in Ireland—that is to say, because this court cannot send its process into Ireland, therefore Lord Langford's agent is to use all means in Ireland to oppose the order of the court here. His Honor said he hoped that Lord Langford would see his error, and know that he could not resist the order of this court; and that the order for a sequestration must therefore be made, unless his Lordship ceased to interfere with the officer of the court.

A motion was made on the part of the defendant, before the Lords Commissioners SHADWELL and BOSANQUET, to discharge the order of the Master of the Rolls; when the same was refused, with costs.¹

SHIELDS v. COLEMAN.

SUPREME COURT OF THE UNITED STATES. 1895.

[*Reported 157 United States, 168.*]

THE facts in this case are as follows: On June 6, 1892, in a suit in the Circuit Court of the United States for the Eastern District of Tennessee, brought by John Coleman against the Morristown and Cumberland Gap Railroad Company and Allison, Shafer & Company, an order was entered appointing Frank J. Hoyle receiver of all the property of the railroad company. The bill upon which this order was made alleged that in 1890 the defendant railroad company had contracted with its co-defendants, Allison, Shafer & Company, for the construction of its line of railroad from Morristown to Corryton, a distance of about forty miles, which work was partially completed in February or March, 1892; that there was yet due from the railroad company to Allison, Shafer & Company, more than \$50,000; that Allison, Shafer & Company were indebted to the complainant for work and labor done in the construction of such railroad; that notice, claiming a lien, had been duly given the railroad company, and that it was insolvent, as were also Allison, Shafer & Company. The prayer was for judgment against Allison, Shafer & Company, that the amount thereof be declared a lien upon the railroad property, and for the appointment of a receiver pending the suit.

¹ *Acc. Sercomb v. Catlin*, 128 Ill. 556. — Ed.

In pursuance of this order the receiver took possession of the railroad. On June 8, 1892, the railroad company appeared and filed a petition for leave to execute a bond for whatever sum might be decreed in favor of the complainant and that the order appointing the receiver be vacated. This petition was sustained, the bond given and approved, and an order entered discharging the receiver. Thereupon the receiver turned the property over to the railroad company, receiving the receipt of its general manager therefor.

On June 20, 1892, T. H. McKoy, Jr., filed his petition in the same case, setting up a claim against the railroad company for services rendered as an employé and vice-president of the railroad company, and for expenses incurred on its behalf. On July 4 and July 7, 1892, other petitions were filed setting up further claims against the railroad company.

On July 27, 1892, each of the defendants filed a separate answer to the complainant's bill. No further order was made by the Circuit Court until November 12, 1892, when, as the record shows, a demurrer of the railroad company to the petitions filed on July 4 and July 7 was argued and overruled, and leave given to answer on or before December rules.

Upon complainant's motion for the restoration of the receivership, W. S. Whitney was appointed temporary receiver of the railroad and its property, and was ordered to take custody and control of the property of the railroad company. On November 29, 1892 an amended and supplemental bill was filed, which stated facts sufficient to justify the appointment of a receiver.

On October 28, 1892, a bill was prepared addressed "to the Honorable John P. Smith, chancellor, etc., presiding in the chancery court at Morristown, Tennessee." This bill was in the name of sundry creditors of the railroad company against it, and other parties, setting forth certain judgments in favor of the complainants against the railroad company; its insolvency as well as that of the firm of Allison, Shafer & Company; the existence of a multitude of unpaid claims, and prayed the appointment of a receiver. This bill having been presented to the Honorable Joseph W. Sneed, one of the judges of the State of Tennessee, he issued, on the same day, an order appointing James T. Shields, Jr., temporary receiver, and directed him to take possession of all the property of the company, and to operate the railroad.

This fiat was on the same day filed in the office of the clerk of the chancery court, and the receiver therein named immediately took possession of the railroad property and commenced the operation of the road. His possession continued until November 14, 1892, when the receiver appointed by the Circuit Court of the United States took the property out of his hands.

On January 7, 1893, the Tennessee court continued Shields as permanent receiver, and ordered him to intervene in the present suit.

On January 24, 1893, the receiver J. T. Shields, Jr., in obedience

to the direction of the chancellor, filed his motion in the Circuit Court of the United States, setting forth the facts herein stated, and praying that court to vacate its order appointing W. S. Whitney receiver of the road, and for an order restoring the possession to him. This motion was on January 30, 1893, overruled, and exception duly taken. Subsequent proceedings were had in the Circuit Court culminating on January 31, 1894, in a final decree, which decree established certain liens, and ordered the property to be sold.

Thereafter an appeal to this court was prayed for and allowed in behalf of the receiver appointed by the State court.¹

BREWER, J. The single question presented by this appeal is that of the jurisdiction of the federal court to appoint a receiver, and take the railroad property out of the possession of the receiver appointed by the State court. . . .

Had the Circuit Court of the United States, when this property was in the possession of the receiver appointed by the State court, the power to appoint another receiver and take the property out of the former's hands? We are of opinion that it had not. For the purposes of this case it is unnecessary to decide whether, as between courts of concurrent jurisdiction, when proceedings are commenced in the one court with the view of the appointment of a receiver, they may be continued to the completion of actual possession, and whether, while those proceedings are pending in a due and orderly way, the other court can, in a suit subsequently commenced, by reason of its speedier modes of procedure, seize the property, and thus prevent the court in which the proceedings were first commenced from asserting its right to the possession. *Gaylord v. Fort Wayne, &c. Railroad*, 6 Biss. 286-291, cited in *Moran v. Sturges*, 154 U. S. 256-270; *High on Receivers*, 3d ed. § 50. Of course, the question can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express object, is the appointment of a receiver, and where possession by such officer is necessary for the full accomplishment of the other purposes named therein. The mere fact that, in the progress of an attachment or other like action, an exigency may arise, which calls for the appointment of a receiver, does not make the jurisdiction of the court, in that respect, relate back to the commencement of the action.

In *Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 301, a question was presented as to the time that jurisdiction attaches. Mr. Justice Matthews, after quoting from *Cooper v. Reynolds*, 10 Wall. 308, and *Boswell's Lessee v. Otis*, 9 How. 336, observed: "But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceedings was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some

¹ The statement of facts has been abridged. Part of the opinion, discussing a question of practice, and other parts dealing with the facts, are omitted. — Ed.

assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may, by law, be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."

Undoubtedly the Circuit Court had authority under the bill filed June 6, 1892, to make the order appointing the receiver and taking possession of the property. Even if it were conceded that the bill was imperfect and that amendments were necessary to make it a bill complete in all respects, it would not follow that the court was without jurisdiction. The purpose of the bill — the relief sought — was, among other things, the possession of the property by a receiver to be appointed by the court, and when the court adjudged the bill sufficient, and made the appointment, that appointment could not be questioned by another court, or the possession of the receiver thus appointed disturbed. The bill was clearly sufficient to uphold the action then taken.

While the validity of the appointment made by the Circuit Court on June 6, 1892, cannot be doubted, yet, when that court thereafter accepted a bond in lieu of the property, discharged the receiver, and ordered him to turn over the property to the railroad, and such surrender was made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching that property.

It is true that the Circuit Court had the power to thereafter set aside its order accepting security in place of the property and enter a new order for taking possession by a receiver, yet such new order would not relate back to the original filing of the bill so as to invalidate action taken by other courts in the meantime. Accepting a bond and directing the receiver to return the property to the owner was not simply the transfer of the possession from one officer of the court to another. The bond which was given was not a bond to return the property if the judgment to be rendered against the contractors was not paid, but a bond to pay whatever judgment should be rendered. It was, therefore, in no sense of the term a forthcoming bond. The property ceased to be *in custodia legis*. It was subject to any rightful disposition by the owner or to seizure under process of any court of competent jurisdiction.

The intervening petitions filed on June 20, July 4, and July 7 are not copied in the record, having been omitted therefrom by direction of the Circuit Court. Evidently, therefore, there was nothing in them which bears upon the question before us, and doubtless they were simply intervening petitions, claiming so much money of the railroad company and containing no reference to the appointment of a receiver.

But it is said that the receiver has no such interest in the property as will give him a standing in the Circuit Court to petition for the restoration of the property to his possession, or to maintain an appeal to this court from an order refusing to restore such possession. This is a mistake. He was the officer in possession by appointment of the State court, the proper one to maintain possession and to take all proper steps under the direction of the court to obtain the restoration of the possession wrongfully taken from him. It is a matter of everyday occurrence for a receiver to take legal proceedings, under the direction of the court appointing him, to acquire possession of property or for the collection of debts due to the estate of which he is receiver. . . .

*The case, therefore, must be remanded to the Circuit Court for further proceedings not inconsistent with this opinion.*¹

HURD v. CITY OF ELIZABETH.

SUPREME COURT OF JUDICATURE, NEW JERSEY. 1879.

[Reported 41 *New Jersey Law*, 1.]

THE plaintiff brought this suit in his character of receiver of the Third Avenue Savings Bank. The allegations touching his right to sue were the following: "For that the said S. H. Hurd heretofore, to wit, on the thirtieth day of November, eighteen hundred and seventy-five, at the city of Kingston, in the State of New York, to wit, at Elizabeth, in said county of Union, was duly appointed receiver of the Third Avenue Savings Bank, by the Supreme Court of the State of New York, in pursuance of the laws of said State of New York, and afterwards, to wit, on the day and year last aforesaid, duly qualified as such receiver, and thereupon became empowered to exercise and perform all the powers and duties imposed upon him as receiver as aforesaid, by virtue of the laws of the State of New York and said appointment, and particularly by said laws and his said appointment, became seized and possessed of the personal property and choses in action of the said the Third Avenue Savings Bank, and entitled to sue for, collect, and receive all moneys then due to the said the Third Avenue Savings Bank, and particularly the several sums hereinafter mentioned."

The declaration then showed, in the form of common counts, sundry moneys due, antecedently to the receivership, to the savings bank, and concluded in the usual style. The defendant demurred.

BEASLEY, C. J. The plaintiff's right to stand as the actor in this suit is derived wholly from the receivership that was conferred

¹ See *In re Schuyler's Steam Tow Boat Co.*, 136 N. Y. 169, 32 N. E. 623. — ED.

upon him by the Supreme Court of the State of New York; and on the part of the defendant, such right is contested on the ground that it is contrary to established rules for the courts here to lend their assistance in carrying into effect an office created in the course of a proceeding before a foreign tribunal. To countenance this contention various authorities are cited, and notably among them that of *Booth v. Clark*, 17 How. 322. But that case belongs to a train of decisions which have been undoubtedly rightly decided, but which are not to be regarded as ruling the precise point now in issue. The decisions thus referred to will be found in *High on Receivers*, § 239, and they are all cases involving a controversy between the receiver and the creditors of the person whose property has been placed under the control of such receiver. In such a posture of things it is manifest that different considerations should have force from those that are to control when the litigation does not involve the rights of creditors in opposition to the claims of the receiver. That the officer of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this State the assets of the debtor, is a proposition that appears to be asserted by all the decisions; but that, similarly, he should not be permitted to remove such assets when creditors are not so interested, is quite a different affair, and it may, perhaps, be safely said that this latter doctrine has no direct authority in its favor. There are certainly dicta that go even to that extent, so that text-writers seem to have felt themselves warranted in declaring that the powers of an officer of this kind are strictly circumscribed by the jurisdictional limits of the tribunal from which he derives his existence, and that he will not be recognized as a suitor outside of such limits. But I think the more correct definition of the legal rule would be that a receiver cannot sue, or otherwise exercise his functions, in a foreign jurisdiction whenever such acts, if sanctioned, would interfere with the policy established by law in such foreign jurisdiction. There seems to be no reason why this should not be the accepted principle. When there are no persons interested but the litigants in a foreign jurisdiction, and it becomes expedient, in the progress of such suit, that the property of one of them, wherever it may be situated, should be brought in and subjected to such proceeding, I can think of no objection against allowing such a power to be exercised. It could not be exercised in a foreign jurisdiction to the disadvantage of creditors resident there, because it is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied. But beyond this precaution, why should any restraint be put upon the foreign procedure? The question thus raised has nothing to do with that other inquiry that is frequently discussed in the books, whether a receiver at common law is in point of fact clothed with the power to sue in a foreign jurisdiction: that is a subject standing by itself, for the present argument relates to a case in which the officer is

authorized, so far as such power can be given by the tribunal appointing him, to gather in the assets, both at home and abroad. Conceding that the officer is invested with this fulness of authority, it would appear to be in harmony with those legal principles by which the intercourse of foreign States is regulated for every government, when its tribunals are appealed to, to render every assistance in its power in furtherance of the execution of such authority, except in those cases when, by so doing, its own policy would be displaced or the rights of its own citizens invaded or impaired. After completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided. The appointment of a receiver, with full powers to collect the property of a litigant, wherever the same might be found, should be deemed to operate as an assignment of such property to be enforced everywhere, subject to the exception just defined. Such a rule is, I think, both practicable and just. If A., being the only creditor of B., should sue him in a court of this State, and the exigencies of justice should require that the property of B., wherever the same might be situated, should be put under the control of the forum in which the proceedings were pending, and such receiver should be appointed and should be legally clothed with the requisite authority to sue for, and take possession of such property, I can find nothing in the rules of law or of good policy that should permit the debtors of B. to set up that such judgment has no extraterritorial force. To sanction such a plea would be to frustrate, as far as possible, the foreign procedure, simply for the purpose of doing so, the single result being that a court would be baffled, and perhaps prevented from doing justice. Such ought not to be the legal attitude of governments towards each other. To the extent to which this subject has been involved, it has, I think, been properly disposed of in the adjudications already made in this State. Thus in *Varnum v. Camp*, 1 Green, 326, it was decided that an instrument efficient at the domicile of the maker to transfer his property could not dispose, in a manner inconsistent with the policy of our laws, of his movables situate here. In this case the duty of comity was admitted, but the decision was put upon the ground that this State was not required, by force of such duty, to abandon an established policy of its own in favor of a different policy prevalent in another jurisdiction. *Moore v. Bonnell*, 2 Vroom, 90, was decided on a similar principle, and it has this additional feature, that while it in a general way rejects the control of the foreign policy, it does this only to the extent rendered necessary for the purpose of self-protection, for, beyond this limit, it gives effect to and enforces the foreign law. And the same disposition to co-operate, as far as practicable, in sustaining an alien policy is exhibited in the case of *Normand's Administrator v. Grognaud*, 2 C. E. Green, 425. The foregoing view will be found to be in accord with the following cases: *Hoyt v. Thompson*, 1 Seld. 320; *Runk v.*

St. John, 29 Barb. 585; *Taylor v. Columbian Insurance Co.*, 14 Allen, 353.

In view of these considerations and authorities my conclusion is, that the legal effect of the appointment of a receiver in a foreign jurisdiction in transferring to him the right to collect the property passing under his control by virtue of such office, will be so far recognized by the courts of this State as to enable such officer to sustain a suit for the recovery of such property.

But it is also said that the declaration is substantially defective. It is certainly informal and so imperfect that upon motion it would have been set aside; and the only question is, whether, by force of our statute, it may not be supported as against a general demurrer. The defects of this pleading are very marked. For example: the appointment of a receiver is a measure incidental to a suit, and yet the pendency of such a suit is not shown, the curt averment being that the plaintiff, at a certain date, was appointed to such office by the Supreme Court of the State of New York. So the capacities of the receiver and his right to sue is in the form rather of a deduction of the pleader than the statement of a fact. I can find nothing analogous to such a course in any of the precedents of pleading. Still, as the imperfections of this declaration could readily have been objected to on motion, which has taken the place of a special demurrer, and as it is not entirely clear whether such imperfections are matters of substance or matters of form, I have concluded that the demurrer ought not to be sustained.¹

¹ Following an early decision of the Supreme Court of the United States, it has sometimes been broadly stated that a foreign receiver can under no circumstances sue. *Booth v. Clark*, 17 How. 322; *Brigham v. Luddington*, 12 Blatch. 237; *Farmer's & M. Ins. Co. v. Needles*, 52 Mo. 17; *Moreau v. Du Bellet* (Tex. Civ. App.) 27 S. W. 503; *Sparks v. Estabrooks*, 72 Vt. 101, 47 Atl. 394; *Filkins v. Nunnemacher*, 81 Wis. 91, 51 N. W. 79. It is generally held, however, that if no domestic creditor is prejudiced thereby a foreign receiver as such will be given a standing in court. *Rogers v. Riley*, 80 Fed. 759; *Kirtley v. Holmes*, 107 Fed. 1; *Boulware v. Davis*, 90 Ala. 207, 8 So. 84; *Patterson v. Lynde*, 112 Ill. 196; *Higbee v. Peed*, 98 Ind. 420; *Metzner v. Bauer*, 98 Ind. 427; *Wyman v. Eaton*, 107 Ia. 214, 77 N. W. 865 (*semble*); *McAlpin v. Jones*, 10 La. Ann. 552; *Castleman v. Templeman*, 87 Md. 546, 40 Atl. 275; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888; *Comstock v. Frederickson*, 51 Minn. 350, 53 N. W. 713; *Glaser v. Priest*, 29 Mo. App. 1; *Bidlack v. Mason*, 26 N. J. Eq. 230; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489; *Runk v. St. John*, 29 Barb. 585; *Merchants' Nat. Bank v. McLeod*, 38 Oh. S. 174; *Lycoming Ins. Co. v. Wright*, 55 Vt. 526. So a foreign receiver may prove in Bankruptcy. *Ex parte Norwood*, 3 Biss. 504. The assignee of a foreign receiver may sue, in a State where the assignee of a chose in action sues in his own name. *Hoyt v. Thompson*, 5 N. Y. 320. In *Falk v. Janes*, 49 N. J. Eq. 484, a foreign receiver appointed at the suit of a New Jersey creditor, who alone was interested, was allowed to sue even against the interest of another domestic creditor.

If proceedings have been begun by creditors to reach the property, either by attachment or by bill in equity, before the appointment of the receiver, the receiver cannot obtain the property, either as against domestic creditors (*Day v. Postal Tel. Co.*, 66 Md. 354; *Hunt v. Columbian Ins. Co.*, 55 Me. 290), or as against creditors

WARD v. CONNECTICUT PIPE MANUFACTURING CO.

SUPREME COURT OF ERRORS, CONNECTICUT. 1899.

[Reported 71 Connecticut, 345.]

APPLICATION by a receiver for instructions in regard to the allowance and payment of certain claims presented against the defendant corporation, brought to the Superior Court in New Haven County and reserved by that court, RORABACK, J., upon an agreed statement of facts, for the consideration and advice of this court.

The Davies & Thomas Company, a Pennsylvania corporation, was a creditor of the defendant, a Connecticut corporation, which was then engaged in construction work in Brooklyn, New York, under a contract with the Kings County Electric Light Company. For the purposes of this work the defendant had an office in Brooklyn, and a considerable quantity of pipes, tools, and material there. Part of the property was attached by the Davies & Thomas Company on December 28, 1897, in a suit against the defendant in the Supreme Court of New York. No service of process was made on the defendant until January 24, 1898, when service was made in Connecticut on its president, an inhabitant of this State, by order of the New York court. Meanwhile, on December 29, 1897, the defendant had been put in the hands of a receiver, in a suit for its dissolution, instituted on that day, by the plaintiffs, who owned three quarters of its capital stock. The decree appointing the receiver, directed him to take immediate possession of all the property of the defendant, and ordered it "and its officers and all persons having in their possession or control any of the property, books, or papers of said company," to surrender them to him, and the defendant "to make any and all conveyances and assurances to said receiver which may be necessary and proper to facilitate and assure the due execution of this order."

Later on the same day the defendant, by vote of its directors, assigned in writing to the receiver, as such, all its property in Brooklyn, and all its choses in action.

The Brooklyn office of the defendant was abandoned on December 31, 1897, and by that time all work under the contract was ended.

On February 24, 1898, a further attachment was made upon the original warrant in the suit of the Davies & Thomas Company on other

from any other State not subject to the jurisdiction of the court which appointed the receiver. *Lichtenstein v. Gillett*, 37 La. Ann. 522; *Bartlett v. Wilber*, 53 Md. 485; *Warren v. Union Nat. Bank*, 7 Phila. 156; *Mosely v. Burrow*, 52 Tex. 404. *Contra*, *Long v. Girdwood*, 150 Pa. 413, 24 Atl. 711.

Even if the attachment by a creditor was made after the appointment of the receiver, the same rule is followed, both as to domestic creditors (*Taylor v. Columbian Ins. Co.*, 14 All. 353; *Willets v. Waite*, 25 N. Y. 577), and as to foreign creditors. *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 24 N. E. 250; *Linville v. Hadden*, 88 Md. 594, 41 Atl. 1097. — Ed.

property of the defendant in Brooklyn. When the service was made on the president, the Davies & Thomas Company knew of the appointment of the receiver.

On April 1, 1898, the Davies & Thomas Company, having taken judgment by default, took out execution, and had it levied on the property attached. It sold for less than its fair market value and the Davies & Thomas Company bought most of it. Others were present at the sheriff's sale and made lower bids. The receiver knew of the sale and suggested to one party that he should go and bid.

The receiver was informed by third parties that all the defendant's property in Brooklyn had been taken by the attachment of December 28, 1897, and hence did not take possession of any of it. In fact part had not been attached, but was subsequently attached in February, as above stated.

After their purchase at the sheriff's sale, the Davies & Thomas Company sold part of the property so bought to third parties for a sum exceeding what it had paid for the whole.

In May, 1898, the Davies & Thomas Company filed with the receiver a claim against the defendant company for the amount of the New York judgment, a copy of which was annexed, less the net proceeds of the execution sale; also an alternative claim for the original indebtedness upon which said judgment was founded, less said proceeds of sale. The claim also set forth that it had attached in said New York suit a certain indebtedness to the defendant under said construction contract from certain parties made garnishees, and put a lien on the work done under the contract for certain materials supplied by it therefor to the defendant; and asked that the cash value of said lien and foreign attachment might be determined according to law.

The receiver having refused to allow the claim, and reported the matter to the court, the following questions were stated for its determination:—

Claims of the Davies & Thomas Company.

“1. That they are entitled to prove their claim against the estate in the hands of the receiver in Connecticut; (2) that they are entitled to prove said claim for the full amount of the judgment, and not simply for the amount of the debt upon which said judgment was founded; (3) that if any deduction from the amount of the claim is to be made because of their security by attachment and execution, as hereinbefore stated, it should be as follows: (a) The cash value of the security held by attachment levied before the receivership should be credited upon the amount of said claim; (b) the cash value of the security held by attachment levied after the receivership should be credited upon said claim; (4) that the price for which the property was sold out by the sheriff, after deducting said fees and expenses as hereinbefore stated, determines the cash value, and that that valuation is conclusive.”

Claims of the Receiver.

"1. That said Davies & Thomas Company are not entitled to prove their claim at all, but that having elected to retain their attachment and proceed against the property in Brooklyn, they are confined to that: (2) that if they can prove it at all, they can prove only the amount of debt upon which said judgment was founded; (3) that the auction sale of the property is not conclusive evidence as to the value of the property; that for the purpose of proof the property attached should be taken at its fair market value at the time of the appointment of the receiver; (4) that if said Davies & Thomas Company are allowed to prove their claim at all, they should be allowed only such a dividend from the estate as added to the value of the property held by them under attachment would equal the amount which they would have received from the estate had they released their attachments and allowed the property to go into the possession of the receiver as a part of the estate; that is, that they should receive such a dividend as, added to the value of the property held by them under their attachment, would be in the same proportion to their claim as the whole estate, including said property so attached by them, would bear to the whole amount of the claims proved against the estate."¹

BALDWIN, J. The judgment recovered by default in the Supreme Court of the State of New York cannot found a claim against the estate in the hands of the receiver. The only service of process upon the defendant having been made out of that State, there exists no personal obligation on its part to pay it.

The right of the Davies & Thomas Company, however, to present its original account against the defendant for allowance in the receivership proceedings in this State, was not prejudiced by its having put it into judgment in New York. That was necessary to secure the benefit of the attachment which had been lawfully made before those proceedings were commenced. *Lawrence v. Batcheller*, 131 Mass. 504. Our statute dissolving attachments made within sixty days before the appointment of a receiver of a corporation (Public Acts of 1895, p. 491), has no application to legal proceedings in other States.

There is no ground for the claim that the Davies & Thomas Company, after receiving notice of the appointment of the receiver in Connecticut, was put to an election whether to pursue its remedy in the New York courts or in those of this State. Whatever might be true, had it been a citizen of Connecticut, it had a right, as a citizen of Pennsylvania, to avail itself of the security which it had already obtained by attachment, as fully as if it had come by a mortgage, and should it prove insufficient to satisfy its demand, to maintain a claim for the balance in the same manner as any other creditor.

The property thus attached naturally brought less than its fair

¹ Arguments of counsel are omitted. — ED.

market value at the sale on execution. Being, however, in the custody of the New York court, and a forced sale being the only legal mode of disposing of it to satisfy the judgment, the net proceeds were all for which the execution creditor was accountable in reduction of its demand.

Different considerations apply to the second attachment, and govern its consequences. It was made after the appointment of the receiver, and with notice of that fact. The decree under which he derived his title required the defendant to execute conveyances of any of its property which might be necessary and proper by way of further assurance. It did execute forthwith a conveyance to him of all its property in New York. The Davies & Thomas Company had notice of the decree, and therefore equitable notice that such a conveyance might have been made, a month before it made its second attachment.

An assignment of personal property, not followed by a change of possession, is voidable by attaching creditors, unless the assignee can give a satisfactory excuse for the want of delivery. *Swift v. Thompson*, 9 Conn. 63. The defect of title is due to a presumption of fraud derived from the consent of the assignee to a continuance of the appearance of ownership in the assignor. An assignment by an insolvent debtor for the benefit of his creditors generally is not within the reason of the rule. He cannot be presumed to intend to defraud any of them by a conveyance made in the interest of all. Nor is it certain that everything that is assigned will be accepted. The representative of the creditors is entitled to a reasonable time within which to decide whether any particular item of the property is worth taking or not.

The suit now before us is one brought by a majority of the defendant's stockholders for its dissolution, and counts upon a vote of the directors that its affairs ought to be wound up and a receiver appointed. The receiver's failure to take possession of the goods upon which the second attachment was levied, is sufficiently explained by the information which he received that they had been seized under the first attachment before his appointment. Under these circumstances, the transfer of title to him was good under our law, as against any creditors of the defendant. It is unnecessary to determine whether the receiver, never having been in possession, could have set it up before the courts of New York to defeat the attachment. He did not intervene for that purpose in the proceedings there, nor, had he done so unsuccessfully, would it have precluded him from insisting that in this suit the Davies & Thomas Company appears in the character of a wrong-doer, asking equity where it has not done equity. *Hibernia National Bank v. Lacombe*, 84 N. Y. 367, 386. General Statutes, § 532, directs courts of probate, in the settlement of estates of insolvent debtors, after providing for preferred claims, to order all other claims allowed by the commissioners to be paid *pro rata*, "subject to such existing equities as may be ascertained and decreed by the court, upon hearing, after

public notice." A similar rule must govern in these proceedings. General Statutes, §§ 1942, 1965; Public Acts of 1895, p. 573, § 3; *In re Waddell-Entz Co.*, 67 Conn. 324. The Davies & Thomas Company not only knew of the decree appointing the receiver, but knew, or had ample means of knowing, when the second attachment was made, that the property had been transferred to the receiver by a good conveyance at common law, executed in furtherance of that decree. It is not alleged, and cannot be presumed that, under the laws of New York, such a transfer is invalid. *Guillander v. Howell*, 35 N. Y. 657; *Hoyt v. Thompson*, 19 N. Y. 207, 224. A voluntary conveyance of goods made by the owner at his domicile, in a form which is sufficient there and also at common law, is effectual to transfer the title, although they may at the time be in another State, unless the statutes or local policy of that State forbid. The present was from the beginning substantially a voluntary proceeding. Its declared purpose was to carry out a vote of the directors of the defendant company providing for winding it up through the agency of a receiver. Service of the writ was accepted by the defendant, with a stipulation for its immediate return, and for a hearing on the day of its issue, upon the application for a temporary receiver. The statute authorizes the Superior Court, as a court of equity, to wind up the affairs of any such corporation and dissolve it, on the complaint of shareholders owing not less than a tenth of its capital stock, if it be found that the interests of the shareholders will thus be best protected. Public Acts of 1895, p. 571, § 1. The appointment of the plaintiff was based upon such a finding. No element of compulsion is disclosed by these proceedings. If the assignment by the defendant to the receiver had been forced upon it at the instance of a creditor, this might have been regarded as an *in invitum* proceeding. *Catlin v. Wilcox Silver-Plate Co.*, 123 Ind. 477, 24 Northeastern Rep. 250. As it is, that question is not involved, for the conveyance made to protect its interests, and under a decree which three-quarters of its shareholders had sought and none opposed, cannot fairly be regarded as other than a voluntary one. It was an exercise of the *jus disponendi* which is incident to ownership. It placed the goods which were its subject precisely where the defendant wished to have them placed, at the disposal of one representing primarily all its creditors and secondarily all its shareholders. This wish had been first expressed by the vote to wind up; then by the consent to an immediate hearing on a petition by three quarters of the shareholders for the appointment of a receiver to aid in carrying out the vote; then by making no opposition to such an appointment, by what was virtually a consent decree; and finally by transferring to him whatever title it could to all that it possessed.

The effect of such a transfer on goods in another State is not to be determined simply by the rule of comity which is applicable to extra-territorial assignments by operation of law; but rests on the general principles of jurisprudence as to the right of every one to dispose of

what he owns. *Egbert v. Baker*, 58 Conn. 319; *First National Bank v. Walker*, 61 Conn. 154.

The Davies & Thomas Company has come into this State to secure, at the hands of a court of equity, the benefit of a winding-up suit, in the course of which it has acquired a special advantage by a seizure of assets of the estate in another jurisdiction, with actual notice of the pendency of the action, and equitable notice of the receiver's title under the conveyance which has been under consideration. No one can claim the benefit of such a proceeding without renouncing every right which is inconsistent with its proper object. That object is, primarily, to dispose of all the property which the defendant owned at the commencement of the suit, subject to existing liens and lawful preferences, for the equal benefit of all its creditors. This cannot be accomplished, if without leave of the court new liens can be created upon it or preferences secured, upon no new consideration, during the pendency of the action.

The benefit of the first attachment can be lawfully retained. That of the second must be renounced, and the property taken upon it considered, as between the receiver and the Davies & Thomas Company, as assets of the estate which it has wrongfully converted, and for which it must account, before it can be allowed to share as a creditor in the estate. The measure of liability is the fair value of the goods at the date of the attachment, with interest. *Oviatt v. Pond*, 29 Conn. 479. As it had no equitable right to levy on them, it is immaterial that they brought less than their value at the sheriff's sale.

If the Davies & Thomas Company pays the amount above stated to the receiver, it should be admitted to prove its claim upon its original account against the defendant, less the net proceeds of the goods sold under the first attachment. In ascertaining such proceeds, no deduction from the gross amount received from their sale should be made on account of fees or costs accruing under the second attachment. If it does not make such payment, its claim should be wholly disallowed. *In re Greeley & Co.*, 70 Conn. 494; *Cockerell v. Dickens*, 3 Moo. P. C. C. 98, 132.

The Superior Court is advised that the Davies & Thomas Company is not entitled to prove its claim against the estate in the hands of the receiver, unless it first pays him the amount specified in the foregoing opinion, and that, upon such payment, it can prove a claim, but only for the original indebtedness, less the net proceeds of the original attachment, ascertained as indicated in said opinion.

No costs will be taxed in this court in favor of any party.

In this opinion the other judges concurred.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY *v.*
KEOKUK NORTHERN LINE PACKET CO., CLUBB,
INTERPLEADER.

SUPREME COURT OF ILLINOIS. 1883.

[*Reported 108 Illinois, 317.*]

THIS was an attachment suit, brought by the Chicago, Milwaukee and St. Paul Railway Company, against the Keokuk Northern Line Packet Company, in the Circuit Court of Adams County, in this State. The writ of attachment was, on the 21st day of April, 1881, levied upon the barge "G. W. Duncan," lying at Quincy, in said county, as the property of the defendant. Samuel C. Clubb, under the provision of section 29 of our Attachment Act, "that any person other than the defendant claiming the property attached may interplead," etc., interpleaded in the case, claiming the property so attached, under an appointment as receiver of the property and effects of said packet company, by the Circuit Court of St. Louis, in the State of Missouri, in a certain cause in said court wherein said packet company was defendant. There was judgment in favor of the interpleader, Clubb, which, on appeal, was affirmed by the Appellate Court for the Third District, and the railway company appealed to this court.

The plaintiff in the attachment suit had first filed a replication to the pleas of the interpleader, traversing the same, but afterward, on its motion granted by the court, it withdrew the replication, as having been filed by mistake, and then moved the court to file its plea in abatement, which had been intended to be filed instead of the replication, denying the right to interplead as receiver under the appointment of a foreign court, which motion the court overruled, whereupon said plaintiff company filed the plea in abatement, which plea the court, on motion of said Clubb, ordered to be stricken from the files. The plaintiff company then refiled its said replication, upon which issue was joined and the trial had. The interpleader's first plea alleges the barge was his own property at the time of the attachment of it; the second, that it was his property as receiver; the third, that at such time it was in his possession as receiver.

The facts of the case shown by the evidence are, that at the October term, 1880, of the Circuit Court of the city of St. Louis, in the State of Missouri, Samuel C. Clubb was duly appointed receiver of the Keokuk Northern Line Packet Company, an insolvent corporation of that State, with power and authority to take possession of all the business and property of the corporation, and to manage the affairs thereof, under the orders of the court, the receiver giving bond in the sum of \$200,000 for the faithful discharge of his duties. At the time of such appointment the barge "G. W. Duncan," in question, was lying at the land-

ing at St. Louis, within the State of Missouri, and within the jurisdiction of said court. The receiver immediately took possession of the barge, and afterward, on the 6th day of November, 1880, he chartered the barge to the steamer "E. W. Cole," for a trip up the Mississippi River and return. The barge was taken, under the charter, up the river as far as Quincy, Illinois, where it was detained by the ice, and remained until the levy of the writ of attachment in this case upon it on the 21st day of April, 1881. At the request of the captain of the steamer "E. W. Cole," the receiver released him from the charter, and took possession of the barge at Quincy, and ever since, until the levy of the attachment, retained such possession, having a watchman over and guarding the barge against danger. The receiver made an effort to have the barge removed to St. Louis as soon as the river was clear of ice, having made a contract with a steamboat line for the purpose, but did not succeed in having the removal made before the attachment. The court which appointed the receiver, at its April term, 1881, made an order authorizing the receiver to intervene in the attachment suit, and take the necessary steps to secure possession of the barge.¹

SHELDON, C. J. We will consider the case as properly presenting by the pleadings the question of the right to interplead in the suit in the capacity of receiver.

The general doctrine that the powers of a receiver are coextensive only with the jurisdiction of the court making the appointment, and particularly that a foreign receiver should not be permitted, as against the claims of creditors resident in another State, to remove from such State the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied, we fully concede; and were this the case of property situate in this State, never having been within the jurisdiction of the court that appointed the receiver, and never having been in the possession of the receiver, it would be covered by the above principles, which would be decisive against the claim of the appellee. But the facts that the property at the time of the appointment of the receiver was within the jurisdiction of the court making the appointment, and was there taken into the actual possession of the receiver, and continued in his possession until it was attached, take the case, as we conceive, out of the range of the foregoing principles. We are of opinion that by the receiver's taking possession of the barge in question within the jurisdiction of the court that appointed him, he became vested with a special property in the barge, like that which a sheriff acquires by the seizure of goods in execution, and that he was entitled to protect this special property while it continued, by action, in like manner as if he had been the absolute owner. Having taken the property in his possession, he was responsible for it to the court that appointed him, and had given a bond in a large sum to cover his responsibility as receiver, and to meet such liability he might maintain

¹ Arguments of counsel are omitted. — ED.

any appropriate proceeding to regain possession of the barge which had been taken from him. *Boyle v. Townes*, 9 Leigh, 158; *Singerly v. Fox*, 75 Pa. 114. It is well settled that a sheriff does, by the seizure of goods in execution, acquire a special property in them, and that he may maintain trespass, trover, or replevin for them.

It is claimed that there was here an abandonment of the barge by leasing it and suffering it to be taken out of the State, — that the purpose in so doing was an unlawful one, and a gross violation of official duty. We do not so view it. The receiver was, by his appointment, authorized to manage the affairs of the corporation under the orders of the court. The business of the corporation was running boats on the Mississippi River, and chartering the barge for a trip up that river was but continuing the employ of the barge in the business of the corporation, and therefrom making an increase of the assets to be distributed among the creditors. *Brownell v. Manchester*, 1 Pick. 233, decides that a sheriff in the State of Massachusetts, who had attached property in that State, did not lose his special property by removing the attached property into the State of Rhode Island for a lawful purpose. *Dick v. Bailey et al.* 2 La. Ann. 974, holds otherwise in respect to property attached in Mississippi, and sent by the sheriff into Louisiana for an illegal purpose. It is laid down in *Drake on Attachment* (5th ed.), § 292, that the mere fact of removal by an officer of attached property beyond his bailiwick into a foreign jurisdiction, without regard to the circumstances attending it, will not dissolve the attachment; that if the purpose was lawful, and the possession continued, the attachment would not be dissolved; but if the purpose was unlawful, though the officer's possession remained, or if lawful and he lost his possession, his special property in the goods would be divested, — citing the two cases above named. We do not consider that there was any unlawful purpose here in the chartering and employing of the barge, as was done.

It is insisted the possession of the barge was lost. There was certainly evidence tending to show possession by the receiver up to the time of the attachment, and in support of the judgment of the Appellate Court we must presume that it found the existence of all the facts necessary to sustain the judgment, where there was evidence tending to show their existence, and that court's finding of fact is conclusive upon us. By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver, and it is the established rule that where a legal title to personal property has once passed and become vested in accordance with the law of the State where it is situated, the validity of such title will be recognized everywhere. *Caniwell v. Sewell*, 5 Hurl. & N. 728; *Clark v. Connecticut Peat Co.*, 35 Conn. 303; *Taylor v. Boardman*, 25 Vt. 581; *Crapo v. Kelly*, 16 Wall. 610; *Waters v. Barton*, 1 Cold. (Tenn.) 450.

Under this rule we hold that where a receiver has once obtained

rightful possession of personal property situated within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession, though he take it, in the performance of his duty, into a foreign jurisdiction; that while there it cannot be taken from his possession by creditors of the insolvent debtor who reside within that jurisdiction. Where a receiver of an insolvent manufacturing corporation, appointed by a court in New Jersey, took possession of its assets, and for the purpose of completing a bridge which it had contracted to build in Connecticut, purchased iron with the funds of the estate and sent it to that State, it was decided that the iron was not open to attachment in Connecticut by a creditor residing there. *Pond v. Cooke*, 45 Conn. 126. And where C. was appointed, by a court in Arkansas, receiver of property of T., a defendant in a suit, and ordered to ship it to Memphis, for sale, and to hold the proceeds subject to the order of the court, and did so ship it to Memphis, where it was attached by creditors of T., it was held that C. could maintain an action of replevin for the property in Tennessee. *Cagill v. Wooldridge*, 8 Baxter, 580. *Kilmer v. Hobart*, 58 How. Pr. 452, decides that receivers appointed in another State, and operating a railway as such, but having property in their hands as receivers in New York, cannot there be sued, — that an attachment issued in such suit will be vacated.

This is not the case of the officer of a foreign court seeking, as against the claims of creditors resident here, to remove from this State assets of the debtor situate here at the time of the officer's appointment, and ever since, and of which he had had no previous possession. It is to such a case as that, as we understand, that the authorities cited by appellant's counsel apply, and not to a case like the present, where the property was, at the time of the appointment of the foreign receiver, within the jurisdiction of the appointing court, and there taken into the receiver's possession, and subsequently suffered by him to be brought into this State in the performance of his duty, and his possession here wrongfully invaded, and he seeking but redress for such invasion.

The judgment of the Appellate Court must be affirmed.

*Judgment affirmed.*¹

¹ *Acc.* *Robertson v. Stead*, 135 Mo. 135, 36 S. W. 610; *Osgood v. Maguire*, 61 N. Y. 524; *Cagill v. Wooldridge*, 8 Baxt. 580; 16 Clunet, 725 (Denmark, 14 Feb. '87). *Contra*, *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892. Where a voluntary assignment is made by the debtor to the receiver, it will be treated like any case of voluntary assignment, and the receiver's rights recognized. *Graydon v. Church*, 7 Mich. 36; *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 64 N. W. 751.

A fortiori, when the right was never in the debtor, but accrued to the receiver, he may sue in any jurisdiction upon his individual right. Thus he may sue for property bought by him: *Pond v. Cooke*, 45 Conn. 126; upon a judgment obtained by him: *Wilkinson v. Culver*, 25 Fed. 639; to foreclose a mortgage made to him: *Inglehart v. Bierce*, 36 Ill. 133; and to enforce the terms of a contract, made with the corporation of which he is the receiver, but performed on his side by himself under an ar-

GILMAN v. KETCHAM.

SUPREME COURT OF WISCONSIN. 1893.

[Reported 84 Wisconsin, 60.]

THE case was that the plaintiff, in his representative capacity as administrator of the estate of Winthrop W. Gilman, deceased, on the 24th day of September, 1891, was a creditor of the Hudson River Boot & Shoe Manufacturing Company, a corporation created and existing under the general laws of the State of New York, in which State the plaintiff also resided, in the sum of \$947.87, and commenced an action in the Circuit Court of Milwaukee County, in which Hubbard & Baker, of West Superior, Wis., were garnished, as being indebted to the said corporation, September 26, 1891; and on the 14th of the following month they filed their answer, admitting an indebtedness to the defendant of \$545.41, and paid that sum into court. On the 8th of February, 1892, by stipulation between the plaintiff's attorneys and the attorneys for William M. Ketcham, the interpleading claimant, he was allowed to interplead in respect to his claim to said money. In Ketcham's answer he alleged that a creditor's bill had been filed in the Supreme Court of the State of New York, on the 28th of July, 1891, against the defendant corporation, for the purpose of effecting a voluntary dissolution of the corporation and the distribution of its effects; that on the 29th of July, 1891, the said supreme court ordered that the creditors of the said corporation, and each and every one of them, be, and they were thereby, restrained from bringing any action against the corporation for the recovery of any sum of money, and they were thereby enjoined from taking any further proceedings on any such actions theretofore commenced. That this order was served personally upon the plaintiff on the 5th of August, 1891, in New York; that on the 31st of October, 1891, pursuant to the order to show cause, and due notice thereof given to each of the creditors, stockholders, and persons interested in said corporation or its affairs, the court ordered and adjudged that the said corporation be, and it was thereby, dissolved, and that William M. Ketcham, the interpleading claimant, was appointed permanent receiver, and qualified as such; and by virtue of such proceedings he became vested with the right and title to all the property, effects, and credits of every description belonging to said corporation, and become entitled to receive the said sum of \$539.45, so admitted by said garnishees to be due, and theretofore paid into court; and that the plaintiff, at the time of the service upon him of said injunctive order, was and still is a resident of the State of New

YORK. See also *range*ment with the other party: *Cooke v. Orange*, 48 Conn. 401; and still more clearly to enforce a contract made as well as performed by himself: *Merchants' Nat. Bank v. Pennsylvania Steel Co.*, 57 N. J. L. 336, 30 Atl. 545.—ED.

York, and prior to the time when said garnishees made and filed their answer they had notice of the appointment of the claimant as such receiver. The claimant demanded judgment that the clerk pay over said sum to him, and for his costs. The plaintiff demurred to the petition, on the ground that it did not state facts sufficient to constitute a cause of action or claim to the fund disclosed and paid into court, and for that the claimant had no legal capacity to maintain the petition. Motion was made to strike out the demurrer as frivolous, and the court so ordered, with \$10 costs, and that the claimant have judgment, with leave to the plaintiff to take issue upon said claimant's intervening petition, or such other proceedings as he might be advised, within 20 days. Plaintiff appealed from the order.¹

PINNEY, J. It is not disputed but that the proceedings in the Supreme Court of New York were properly instituted and conducted, and the dissolution of the corporation regularly adjudged, upon the voluntary application of its trustees, and the respondent appointed receiver of all its property, assets, and estate according to the statute of that State, with a view of applying the proceeds equally to the payment of all its creditors, and the distribution of any residue equally to and among its stockholders. The plaintiff in this action was at the time, and still is, a resident and citizen of the State of New York, of which State the corporation was a citizen, and he was served with an injunction in that proceeding restraining him, as a creditor of the corporation, from commencing any suit against it to enforce the collection of his debt, in order that the property and assets of the corporation might be properly and judiciously administered and applied by the receiver under the authority of the court appointing him, and in the regular and orderly administration of its estate. The proceeding did not contemplate a discharge of the debtor as upon the surrender and application of his property under insolvent laws, but the property of the corporation was passed and vested, pursuant to the statute, in the respondent as its receiver, and the corporation was dissolved, so that no other than the receiver had a right to assert or maintain any title to it thereafter, and he could do so only for the purpose of its equal and just application to the payment of its creditors, and the just division of any residue to and among its stockholders. The effect of such voluntary dissolution was to place all its property and assets *in custodia legis* to be collected and applied by the receiver. There is nothing in the statute of New York, or in this proceeding under it, in conflict with or in contravention of the laws or public policy of this State, as declared by its statutes and the decisions of its courts, nor does the present proceeding interfere, or tend to interfere, with or prejudice the rights of any citizen of this State. The case concerns citizens of New York alone, the gar-

¹ The statement of facts is slightly condensed, and arguments of council are omitted. — Ed.

nishees having paid the fund into court and been discharged. The case is therefore free from all objections which, by the general current of authority, might prevent or induce the courts of Wisconsin to refrain from giving, in a spirit of just interstate comity, the same force and effect here to the proceedings in the Supreme Court of the State of New York in question as would be accorded to them there. There are many cogent reasons, in our judgment, why we should accord to them such effect upon principles of comity.

The situation in brief, is that after the plaintiff had been enjoined, by a competent court of the jurisdiction in which he resided, from bringing any action against the corporation, his debtor, for the recovery of any sum of money, so that he should not obtain any undue preference over its other creditors, in violation of the purpose and policy of the law of New York and the proceeding thus instituted, and after an adjudication absolutely dissolving the corporation had been made, and after the title to its property, effects, and credits had been vested in the claimant as such receiver, the plaintiff came into the Circuit Court of this State, and commenced an action to recover his demand against a dissolved corporation. The question is one wholly between parties residing in New York and bound by the proceedings in question, neither of whom is in any position to invoke the assistance of the courts of this State to defeat or deny full effect to the proceeding in New York, or the title resulting from it. It is clear that the adjudication of dissolution, and the appointment of the receiver vesting in him the title to the chose in action in question, were binding on these parties, and the courts of New York would have enforced the receiver's title had this controversy originated there. The plaintiff asks us to aid him in violating the law of his own State and evading the process of its courts. Our own citizens, in a proper case, would no doubt be protected against the effect of such extra-territorial act and adjudication, if injurious to their interests or in conflict with the laws and public policy of Wisconsin, and effect would not be given to it at the expense of injustice to our own citizens. The transfer of this debt, valid in New York, must, we think, be held valid on principles of comity here. When, therefore, the garnishee process was served, there was no debt due to the corporation upon which it could act, and the money that has been paid into court belongs to the receiver claimant; and, no principle of public policy or rights of citizens of Wisconsin intervening, by a fair and liberal spirit of comity our courts ought to give the same force and effect to the proceedings in question as they would have in the courts of New York.

The tendency of modern adjudications is in favor of a liberal extension of interstate comity, and against a narrow and provincial policy, which would deny proper effect to judicial proceedings of sister States under their statutes and rights claimed under them, simply because, technically, they are foreign and not domestic. In the recent case

of *Cole v. Cunningham*, 133 U. S. 107, the subject was very fully considered, and the various cases were cited; and it was there held that a creditor who is a citizen and resident of the same State with his debtor, against whom insolvent proceedings have been instituted in said State, is bound by the assignment of the debtor's property in such proceedings, and if he attempts to attach or seize the personal property of the debtor, situated in another State and embraced in the assignment, he may be restrained by injunction by the courts of the State in which he and his debtor reside; that every State exercises, to a greater or less extent, as it deems expedient, the comity of giving effect to the insolvent proceedings of other States, and where the transfer of the debtor's property is the result of a judicial proceeding, as a general rule, no State will carry it into effect to the prejudice of its own citizens. *Reynolds v. Adden*, 136 U. S. 353, 354. In *Bagby v. A., M. & O. R. Co.*, 86 Pa. St. 291, it was held that, where a receiver of a corporation has been appointed by a court of competent jurisdiction in another State, a creditor who resides in that State and is bound by the decree of its court appointing the receiver cannot, in an attachment or execution, recover the assets of the corporation in another State, which the receiver claims. In *Bacon v. Horne*, 123 Pa. St. 452, 453, speaking to this point, the court said: "As before observed, both of these parties, plaintiffs and defendant, are residents of New York. They come into this State to obtain an advantage by our law which they could not obtain by their own. They are seeking to nullify the law of their own State, and ask the aid of our court to do so. This they cannot have. If for no other reason, it is forbidden by public policy and the comity which exists between the States. This comity will always be enforced when it does not conflict with the rights of our own citizens." To the same effect is the case of *In re Waite*, 99 N. Y. 433, 439, 448, and also *Phelps v. McCann*, 123 N. Y. 641. In *Toronto General Trust Co. v. C., B. & Q. R. Co.*, 123 N. Y. 37, 47, it was said that "foreign receivers and assignees, taking their title to property by virtue of foreign laws or legal proceedings in foreign courts, may come here and maintain suits in our courts when they do not come in conflict with the rights or interests of domestic creditors;" and the general rule laid down in *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, must be considered as qualified by these cases. The same doctrine is laid down in *Woodward v. Brooks*, 128 Ill. 222, where it is held that if an assignment is valid in the State where made it will be enforced in another State as a matter of comity, but not to the prejudice of the citizens of the latter, who may have demands against the assignor; that while it is contrary to public policy to allow the property of a non-resident debtor to be withdrawn from the State, and thus compel creditors to seek redress in a foreign jurisdiction, yet for all other purposes between the citizens of the State where the assignment is made, if valid by the *lex loci*, it will be carried into effect by the courts

of Illinois; and this rule is held not to be in conflict with *Rhawn v. Pearce*, 110 Ill. 350. The assignment in this case was voluntary, it is true, and not by proceedings *in invitum*. We are unable to see upon what substantial ground it can be maintained that the title of the receiver in this case, founded upon the voluntary dissolution of the corporation, does not stand on equally as favorable ground as that of an assignee for the benefit of creditors. *Parsons v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 305; *Relfe v. Rundle*, 103 U. S. 222, 225; *Williams v. Hintermeister*, 26 Fed. Rep. 889. In *Bank v. McLeod*, 38 Ohio St. 174, it was held that a receiver appointed under the authority of the court of one State, and vested with the title to property temporarily in another, might, under the comity between States, by an action brought in the latter State in his own name, assert his right to the possession of it, where such right was not in conflict with the rights of the citizens of the latter State, nor against the policy of its laws; nor is there anything in the case of *McClure v. Campbell*, 71 Wis. 350, in conflict with this conclusion. Mr. Justice Lyon had in view in that case the question of giving effect to foreign insolvency proceedings resulting in a discharge of the debtor prejudicially to the interests of citizens of the State wherein the assignee attempted to enforce the assignment. In *Filkins v. Nunemacher*, 81 Wis. 91, the question was whether judicial comity would allow a receiver, appointed in a creditors' suit in another State, to maintain a suit in Wisconsin to set aside an alleged fraudulent conveyance, from the debtor to the defendant, of property within the latter State, and presented an entirely different question from the one in this case, which is whether a foreign receiver can be heard to assert in the courts of this State a title to property which he claims by an assignment valid and binding against all the parties to the litigation, and is more nearly analogous to the question involved and decided in *Cook v. Van Horn*, 81 Wis. 291. The question is not materially different from that involved in *Smith v. C. & N. W. R. Co.*, 23 Wis. 267, where it was determined that effect would be given by the courts of this State, subject to the qualifications here stated, to an assignment made in another State by a party in order to avoid imprisonment in proceedings supplemental to execution for refusal to apply rights in action—corporate stocks—to the payment of a judgment; and it is evident that, if the title depended wholly upon the coercive power of the court, the result would have been the same. The principle is universal that the assets of insolvent corporations are to be regarded as a trust fund for the benefit of all the creditors, and “that kind of diligence by which one creditor of an insolvent corporation secures to himself a prior right to its property, and an unequal advantage over the other creditors, is without merit, and more selfish than just.” *Ballin v. Loeb*, 78 Wis. 404. The public policy of Wisconsin and New York in this respect are in accord.

For these reasons we are of the opinion that the claim of the

receiver, as stated in his intervening petition, to the fund in court, must be sustained, and that the Circuit Court properly overruled the plaintiff's demurrer thereto.¹

PAIGE v. SMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[*Reported 99 Massachusetts, 395.*]

CONTRACT for the value of fifty-five bales of hay. In the Superior Court facts were agreed in substance as follows: "The defendants were originally trustees of the Vermont Central Railroad, under the first mortgage bonds; and they were, prior to the year 1861, operating the Vermont Central Railroad under a possession taken under said bonds, and the Vermont and Canada Railroad under a lease, or supposed lease. A controversy arose between the Vermont and Canada, and the Vermont Central Railroad Companies, as to which of them should have a right to operate the road; a bill in equity was filed in the court of chancery in the State of Vermont; and during the pendency of said bill receivers were appointed by the court to operate said roads, and, at the time of the occurrence of the matters in controversy in this suit, the defendants were operating both of said roads, under the decree." "Prior to February 20, 1864, the plaintiff made a contract with the defendants, acting as receivers aforesaid, through their agent, for the transportation of hay, over said roads and other roads, to Boston; the terms of which contract are in dispute, and are to be shown by the plaintiff, and the defendants may also offer evidence in relation thereto. Under said contract the defendants furnished a platform car for the transportation of hay," "and Reynoulds, Soule & Co., on February 20, 1864, having sold hay to the plaintiff, shipped on said car on the Vermont and Canada Railroad, for the plaintiff, fifty-five bales of the plaintiff's hay," of a value which was agreed. "Said car with said hay was, within one or two days afterwards, on its passage to Boston, and, while on the Vermont and Canada Railroad, operated by the defendants as receivers as aforesaid, burned and destroyed by fire. Either party being at liberty to prove any facts tending to show negligence or care in regard to the loss of said hay."

At the trial, before WILKINSON, J., before the plaintiff called any witnesses, the judge, at the defendants' request, ruled that on the

¹ *Acc. Schindelholz v. Cullum*, 55 Fed. 885; *Bagby v. Atlantic, M. & O. R. R.*, 86 Pa. 291. See *Faulkner v. Hyman*, 142 Mass. 53. *Contra*, *City Ins. Co. v. Commercial Bank*, 68 Ill. 348; *Commercial Nat. Bank v. Matherwell Iron & Steel Co.*, 95 Tenn. 172, 31 S. W. 1002. — ED.

agreed facts the plaintiff could not recover, and directed a verdict for the defendants. The plaintiff alleged exceptions.

FOSTER, J. The Supreme Court of Vermont, in an action against these defendants, held that, "if in fact they were common carriers over a line of railroad, it could be no defence to an action at law for a breach of duty or obligation arising out of business entrusted to them in that relation, that they were running and managing the line of railroad as receivers under the appointment of the court of chancery." *Blumenthal v. Brainerd*, 38 Vt. 408.

It is impossible for the courts of this Commonwealth to accord to these defendants an exemption from the ordinary common law liabilities of common carriers, more extensive than they are allowed in the State in which they were appointed receivers, and in which the accident occurred. Under these circumstances, the ordinary rule for which the defendants contend, that receivers are amenable solely to the court by which they are appointed, is inapplicable.

*Exceptions sustained.*¹

RELFE v. RUNDLE.

SUPREME COURT OF THE UNITED STATES. 1880.

[*Reported 103 United States, 222.*]

WAITE, C. J. The Life Association of America was, on the 5th of November, 1879, a corporation of the State of Missouri, for the purpose of doing a life insurance business, with its chief office at St. Louis, in that State. By the laws of Missouri, the superintendent of the insurance department of the State government might, under certain circumstances, institute proceedings in the courts of the State for the dissolution of such a corporation and the winding up of its affairs. Section 6043 of the Revised Statutes of Missouri is as follows:—

"Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee-simple and absolutely in the superintendent of the insurance department of this State, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policy-holders of such company, and such other persons as may be interested in such assets."

On the 13th of October, 1879, L. E. Alexander, a citizen of Missouri, and the receiver of the Columbia Life Insurance Company of Missouri, recovered a claim against the Life Association of America for

¹ *Acc. Phelan v. Ganebin*, 5 Col. 14; *Kain v. Smith*, 80 N. Y. 458. A receiver acting beyond the jurisdiction of his court is still subject to the directions of the court. *Guarantee T. & S. D. Co. v. P. R. & N. E. R. R.*, 69 Conn. 709, 38 Atl. 792.—ED.

\$1,100,000, and thereupon William S. Relfe, the superintendent of the insurance department of the State, commenced proceedings under the statute to dissolve the last-named corporation and wind up its affairs. In his petition he prayed that the company might be enjoined from doing any further business, and that an agent might be appointed to take charge of its property temporarily. Such an order was made in the cause, and D. M. Frost, a citizen of Missouri, appointed temporary agent and receiver. Frost at once qualified under this appointment.

On the 5th of November, 1879, Rundle and wife, the appellees, policy-holders of the company, commenced suit in the Fifth District Court of the Parish of New Orleans, against the life association, Frost, the temporary agent and receiver, John R. Fell, the local agent of the company at New Orleans, and L. E. Alexander, receiver of the Columbia Life Insurance Company, the object of which was to have the assets of the company in Louisiana declared a trust fund and applied to the payment of the claims of Louisiana creditors and policy-holders in preference to others. In the bill the decree in favor of the receiver of the Columbia Life Insurance Company, and the proceedings by Relfe, the superintendent of the insurance department, with the appointment of Frost as temporary receiver, were set out in detail, and the whole object and purpose of the suit was to keep the Louisiana assets out of the hands of Relfe and his successors in office. No special relief was asked against the receiver of the Columbia Life Insurance Company. Upon the filing of the bill, Walter B. Wilcox was appointed receiver. Service of process was made on Alexander only through Francis B. Lee, who was appointed *curator ad hoc* at the same time that Wilcox was appointed receiver. Fell was made a party only for the purpose of reaching property in his hands.

On the 10th of November the company was dissolved by a decree of the Missouri court, and its property vested in Relfe, superintendent of the insurance department, as provided by the statute. On the 17th of the same month Relfe was, on his own motion, made a party to the suit in New Orleans, as the legal representative of the late corporation, and on the 28th he filed a petition for the removal of the cause to the Circuit Court of the United States for the District of Louisiana. In his petition he set forth his own citizenship in Missouri, and that of the appellees in Louisiana. The citizenship of all the other persons named as parties to the suit appeared in the pleadings. He also gave the security required by the act of Congress, and on the 5th of December, which was in time, filed in the Circuit Court a copy of the record in the State court. On the 9th of the same month the receiver appointed in the State court moved to dismiss the cause and strike it from the docket of the Circuit Court: 1, because that court was without jurisdiction either of the person or the subject-matter; 2, because Relfe had no standing in court, he being a creature of the State of Missouri, without capacity to sue or remove causes in Louisiana; 3,

because the suit was improperly removed; and, 4, because the State court having first taken charge of the property, the Circuit Court could not interfere with the possession of the receiver of that court. While this motion was pending, and on the 30th of December, the life association and Frost filed their petition in the State court, setting forth the former petition of Relfe, and adopting it and all that had been done under it as their own, and also asking that the suit be removed on their own account. They also gave the security required by the act of Congress. On the 5th of January the Circuit Court heard the motion of the State court receiver made on the 9th of December, and remanded the cause. From that order the life association, Relfe, and Frost took this appeal, under the fifth section of the act of 1875, c. 137. 18 Stat., pt. 3, p. 472.

We think the Circuit Court erred in remanding the cause. The entire controversy is between the appellees, representing the Louisiana creditors and policy-holders, on one side, and Relfe, the statutory representative of the corporation and its property, on the other, as to their respective rights to what the appellees claim are Louisiana assets belonging primarily to Louisiana creditors. Fell and the receiver of the Columbia Life Insurance Company are formal parties only. Fell has in his possession, as a naked trustee, some of the Louisiana assets, and the receiver of the Columbia Life Insurance Company is, so far as anything appears, no more than a general creditor of the dissolved corporation whom, necessarily, under the law, Relfe represents. After the decree of dissolution the Life Association Company had no longer any corporate existence, and the temporary agency and receivership of Frost was ended when the property of the corporation was transferred to Relfe, and he became under the law entitled to the possession.

Relfe is not an officer of the Missouri State court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the State, and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact, the corporation itself for all the purposes of winding up its affairs.

We are aware that, except by virtue of some statutory authority, an

administrator appointed in one State cannot generally sue in another, and that a receiver appointed by a State court has no extraterritorial power; but a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents, and the State which creates it may say who those agents shall be. One may be its representative when in active operation, and in full possession of all its powers, and another if it has forfeited its charter and has no lawful existence except to wind up its affairs. No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution.

By the charter of this corporation, if a dissolution was decreed, its property passed by operation of law to the superintendent of the insurance department of the State, and he was charged with the duty of winding up its affairs. Every policy-holder and creditor in Louisiana is charged with notice of this charter right which all interested in the affairs of the corporation can insist shall be regarded. The appellees, when they contracted with the Missouri corporation, impliedly agreed that if the corporation was dissolved under the Missouri laws, the superintendent of the insurance department of the State should represent the company in all suits instituted by them affecting the winding up of its affairs. Relfe, therefore, became, by operation of law, the successor of the corporation in the litigation these appellees instituted in Louisiana. He was, in legal effect, their only opponent in the suit they had begun, and as he appeared in time and was a citizen of Missouri, representing a Missouri corporation, he was entitled to remove the cause and require citizens of Louisiana to litigate their claims with him in the courts of the United States.

The order of the Circuit Court remanding the suit will, therefore, be reversed, and the record remanded to that court with instructions to proceed according to law as with a pending suit within its jurisdiction by removal; and it is

*So ordered.*¹

¹ *Acc.* *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. 305; *Bockover v. Life Assoc. of America*, 77 Va. 85. *Contra*, *Willetts v. Waite*, 25 N. Y. 577. — Ed.

PEOPLE v. GRANITE STATE PROVIDENT ASSOCIATION.

COURT OF APPEALS, NEW YORK. 1900.

[Reported 161 New York, 492.]

O'BRIEN, J. The only question in this case is one concerning the distribution of a fund now under the control of the courts of this State, which is owned by a foreign corporation. The defendant corporation was created by the laws of New Hampshire as a building and loan association, and was permitted to transact business in this State. In January, 1896, the authorities of the State where this corporation is domiciled took proceedings in the courts of that State to restrain it from any further prosecution of its business. In this proceeding an assignee or trustee was appointed to take charge of the property as provided by the local law. Subsequently, this action was brought in the courts of this State by the attorney-general in behalf of the People, under the provisions of the Code, for the sequestration and preservation of the assets and property of the corporation in this State, and for an equitable distribution of the same among the persons entitled thereto. In order to carry out the objects of the action a receiver was also appointed in this State. The New Hampshire assignee upon his own application was made a party to the action, and so is bound by the judgment.

It appears from the record that the corporation transacted business in several other States. The stockholders, at the time of the appointment of the receiver in this State, exceeded in number twenty thousand, of whom nearly one-sixth were residents of this State, and about one-fourth of the assets was located here; or, at least, the situation was such that they could not be collected or distributed except through the action of the courts of this State. The fund in controversy may be divided into two parts. About \$69,000 represents assets of the corporation collected by the receiver in this action from the foreclosure of mortgages and other obligations due from parties in this State, and the sale of some realty located in this State. The securities thus collected were transmitted to the receiver by the assignee in New Hampshire under the direction of the courts of that State. The other part of the fund consists of a special deposit of \$100,000, which the corporation was required to make under the Banking Law of this State, in order to acquire the right to transact its business here.

With respect to that part of the fund first mentioned, which is described in the record as the general fund, the court below, by the amendment of the original judgment, directed the receiver in this State, after paying the expenses of the receivership, to transmit the same to the assignee in New Hampshire for general administration, upon receiving from such assignee at the domicile a bond or under-

taking in a sum equal to double the amount to be so paid over, with sufficient sureties to be approved by a justice of the court, conditioned for the payment by the assignee of the domicil to each creditor and shareholder resident in this State of the same dividend on his claim that may be awarded other creditors and shareholders throughout the country, without any deduction on account of any sum the creditor and shareholder of this State might receive from the special fund hereafter mentioned; and that in default of such payment to the domestic creditors and shareholders, that the foreign assignee would return to the receiver in this State, or his successor, the general fund so paid over. The only objection made to this part of the judgment is to the provision which requires the assignee at the domicil to execute the bond before described as a condition of receiving the fund in the hands of the domestic receiver. The general assets of a corporation are to be administered and distributed at the home of the corporation; but in order to accomplish that result, ancillary trustees or assignees must frequently be appointed in other jurisdictions, subject to the control and direction of the local courts. All creditors of a corporation, wherever residing, are entitled, in case of insolvency, to have the general assets distributed among them upon principles of perfect equality.

The courts of one State have no right to favor domestic creditors in the distribution, but it must be made upon the principle that equality is equity. *Blake v. McClung*, 172 U. S. 239.

In the case at bar the foreign assignee is a party to the action upon his own application; he asks for the transmission to him in another State of the fund now under the control and in the custody of the courts of this State through the receiver. We think that the court below, in directing the transmission of the fund to another jurisdiction, had the power to impose such conditions as are just and reasonable, with a view to the protection of domestic creditors, and that was the only purpose for which the bond or undertaking was required. We do not think it can be said, as matter of law, that the court was bound to direct the transmission of the fund to the administration at the domicil without exacting any conditions whatever. It doubtless had the power to do so if it was thought to be wise and expedient. But it determined that before sending the fund out of the jurisdiction of the court, it was just and reasonable to require the foreign assignee to give security to the effect that he would distribute the fund upon principles of perfect equality. In other words, the court had power to guard against any discrimination on the part of the foreign assignee against domestic creditors by reason of any trust fund which was held in this State for their benefit. *People v. Remington*, 121 N. Y. 328. We think, therefore, that no rule of law or any absolute legal right of the foreign assignee was violated by that provision of the judgment requiring him to give the security referred to.

The fund in the hands of the domestic receiver, arising from the

conversion of the special deposit in the banking department, stands upon a different ground. The defendant, in order to acquire the right to transact its business in this State, was obliged to make this deposit since the statute so provides. If this was a deposit as security merely for domestic creditors, we would be inclined to agree with the learned counsel for the defendant, who insists that this fund should be devoted to the benefit of all creditors equally wherever residing. But it is something more than a mere deposit as security. It is in the nature of a fund held in trust for the benefit of domestic creditors and shareholders of the defendant. The deposit was made in obedience to section fourteen of the Banking Law, as a condition of the defendant's right to transact business here. By section thirty-three it is provided, in substance, that upon the appointment of the receiver of a corporation in this State the superintendent of the banking department shall pay over to him the funds remaining in his hands, less any charges that he may have against the same, and the receiver shall distribute these funds among the creditors and shareholders of the corporation residing in this State in the manner prescribed by law for the payment of creditors in the case of voluntary dissolution of a corporation. It is apparent from the provisions of these two sections, that the securities so deposited were held by the superintendent as a trustee for domestic creditors and shareholders. The defendant corporation in making the deposit must be deemed to have consented that in case of insolvency the fund might be distributed according to the terms of the statute; that is to say, to creditors and shareholders residing in this State. So that by the act of the corporation itself, in availing itself of the benefit of the statute, it has devoted this fund to the benefit of the domestic creditors and shareholders; at least so far as to enable them to receive payment upon all their obligations in full. Therefore, the application of the fund to their benefit in the first instance does not infringe upon the provision of the Federal Constitution that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. *Blake v. McClung, supra.*

The court below, therefore, directed that this fund be disposed of in the following manner, after paying the expenses of administration: (1) In case the foreign assignee should give the undertaking provided for, with respect to the general fund, and the whole fund received by him was insufficient to pay all the creditors throughout the country in full, then the domestic receiver should pay from this special fund the balance of all just claims due to the creditors residing within this State at the time of his appointment, and after such payment distribute the balance of the special fund remaining in his hands among the different shareholders residing within this State until they were paid in full.

(2) In case the fund in the hands of the foreign assignee should prove to be sufficient to pay all the creditors in full, but insufficient to pay the shareholders throughout the country in full, then the domestic

receiver should distribute the balance remaining in his hands to the domestic shareholders at the time of his appointment until they were paid in full.

(3) That in case anything remained in his hands after paying the claims of the creditors, and shareholders in this State in full and all expenses, the same should be paid to the assignee at the place of the domicil.

Assuming that the special deposit referred to was a fund held in trust here for the benefit of domestic creditors and shareholders, as we think it was, there is no legal error in this principle of distribution. It is quite true, as the counsel for the defendant suggests, that it impounds a large sum, a part of the assets of the corporation, for the benefit of creditors here. But we think the answer to all that is, that there is no injustice in devoting the fund to the very purpose for which it was created and sent here. The corporation could have declined to enter the State upon such conditions, but having accepted them by making the deposit, no creditor or shareholder in any other State can complain because the courts of this State have, with the consent of the corporation, devoted the fund in the first instance to the payment of home creditors and shareholders. The defendant virtually consented, when it made the deposit, that it should be distributed in this manner in case of insolvency.

The judgment appealed from should, therefore, be affirmed, with costs to the foreign and domestic receivers, respectively, to be paid out of the general fund.

PARKER, Ch. J. (dissenting). I am unable to agree with so much of the judgment about to be affirmed as requires the New Hampshire assignee to give an undertaking as a condition precedent to his receiving the moneys, which the court holds he should receive, for distribution to general creditors. This does not involve the special fund of \$100,000, deposited with the superintendent of banks for the benefit of creditors residing within this State, but relates solely to the fund resulting from the foreclosure of mortgages and other assets of the Granite State Provident Association, that were by the courtesy of the New Hampshire court and the assignee turned over to a receiver in this State of the property of that corporation situated here. The New Hampshire court did not require that the New York ancillary receiver should give a bond on the turning over of such assets for collection, and if the proceeds, less the expenses of collection and of administration, should be transmitted to the New Hampshire assignee to be distributed, as all are agreed it should be, like courtesy commands that it should go unhampered by any condition whatever. Comity requires that full faith and confidence should be given to the Supreme Court of New Hampshire, and the presumption ought to be indulged that that court will compel the assignee to make a just distribution of the fund which may be in his hands, and will not countenance any dereliction of duty on his part. The precedent that this decision will constitute

seems to me an unfortunate one, with decidedly mischievous tendencies in a country having forty-five States, with necessarily as many independent jurisdictions. I advise that the money be paid without condition.

All concur, with O'BRIEN, J., for affirmance, except PARKER, C. J., who reads dissenting opinion. *Judgment affirmed.*¹

¹ An ancillary receiver may be appointed to take charge of the assets within the State. *Williams v. Hintermeister*, 26 Fed. 889; *Holbrook v. Ford*, 153 Ill. 633, 39 N. E. 1091; *Evans v. Pease*, 21 R. I. 187, 42 Atl. 506. This is merely discretionary with the court, which may refuse to make the appointment. *Irwin v. Granite State Provident Assoc.*, 56 N. J. Eq. 244, 38 Atl. 680; *Borton v. Brines-Chase Co.*, 175 Pa. 209, 34 Atl. 597. Thus where there were no domestic creditors, so that the principal receiver would be allowed to take the assets, the court refused to appoint an ancillary receiver, since the only effect of doing so would be to increase the expenses. *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805.

The ancillary receiver has power to take only property within the jurisdiction of the court. *Reynolds v. Stockton*, 140 U. S. 254; *Holbrook v. Ford*, 153 Ill. 633, 39 N. E. 1091. He may, however, like any receiver, do acts in connection with the estate outside the jurisdiction. *Guarantee T. & S. D. Co. v. P. R. & N. E. R. R.*, 69 Conn. 709, 38 Atl. 792.

When the assets have all been collected, the creditors within the jurisdiction, at least, may be paid the proper proportionate part of their debts. *Fawcett v. Order of Iron Hall*, 64 Conn. 170, 29 Atl. 614; *Failley v. Fee*, 83 Md. 83, 34 Atl. 839. In the Southern District of New York the federal courts pay resident creditors in full, or to the extent of the assets. *Sands v. Greeley*, 83 Fed. 772. Or in its discretion the court may order the assets transmitted to the principal receiver, to be administered along with the principal estate; but this will not be done until the court is sure that the creditors within its jurisdiction will share proportionately with all other creditors. *Buswell v. Order of Iron Hall*, 161 Mass. 224, 36 N. E. 1035; *Baldwin v. Hosmer*, 101 Mich. 119, 59 N. W. 432. — Ed.

CHAPTER XV.

JUDGMENTS.

SECTION. I.

THE NATURE OF A JUDGMENT.

SAWYER v. MAINE FIRE AND MARINE INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1815.

[Reported 12 Massachusetts, 291.]

THIS was an action of the case upon a policy of insurance, dated March 20th, 1812, for \$6,000 upon the brig "Lydia," valued at \$7,000, at and from Portland to one or more ports in the West Indies, and at and from thence to her port of discharge in the United States, against capture and condemnation only. The plaintiffs declared for a total loss by capture, in the first count, by a vessel unknown, belonging to citizens of Hispaniola; and in the second count by pirates, rovers, &c., on the 19th of April, 1812.

On the trial before PUTNAM, J., at the sittings here by adjournment of the last October term, it appeared that proof of the loss was made, and an abandonment offered, on the 14th of May, 1812. The policy and interest were admitted.

The plaintiffs proved that, at the time of making the insurance, it was stated to the defendants that the vessel was bound to Port au Prince. They also read the deposition of Elisha Sawyer (a copy of which came up in the case), stating that he was master of the said vessel on the voyage insured: that on arriving in sight of Port au Prince he was hailed by an armed brig belonging to the king of Hayti, and ordered to come on board. The captain then informed the witness that he was fighting against Petion, who had possession of Port au Prince, that the king of Hayti wanted his provisions, and that if he, the witness, would go to St. Mark's, he should have a good price for his cargo; but that if he refused he should send him. On the witness refusing, a prize master and five men were put on board the brig, and an armed schooner accompanied her to St. Mark's. On his arrival there he was ordered on shore, and was carried before the prince Gonaive, who said he wanted the cargo, and would pay the witness for it. The prince then ordered the sails taken from the brig and

brought on shore, and twelve men were placed on board. The witness then went on board the vessel, and on the third day after was, with all his crew, ordered on shore; and on being carried before the minister of justice so called, he read to them a condemnation of the vessel and cargo. The next day the vessel was sold and the cargo taken out and put into the king's warehouse. The vessel was purchased by Messrs. Dodge and Myers, of Philadelphia, for the master, at the price of \$4,000, and he went in her to Philadelphia, where he sold her. He had never heard of the blockade of Port au Prince before his capture. The king of Hayti and all his officers were black, except his majesty's interpreter, who was a mulatto. The principal facts in the master's deposition were confirmed by the testimony of the mate of the vessel. The defendants produced a copy of the condemnation, which came up in the case, and contended that it thereby appeared that the brig was condemned for a violation of the blockade of Port au Prince by the emperor of Hayti; and that the decree was to be considered as conclusive evidence of the facts thereby decided.

There was no evidence that Port au Prince was in fact blockaded at the time of the capture, other than what arises from the said decree of condemnation. Nor was there any evidence that the brig was notified of any blockade, or warned not to enter for that cause prior to the capture. The collector of the customs for the district of Portland testified that, since the expiration of the law of the United States prohibiting intercourse with St. Domingo, many clearances had been made from the United States for Port au Prince, and many clearances from Hayti to the United States. It was in evidence that Christophe, or Henry, was the sovereign *de facto* of Cape François and of that part of the island; and that Petion was the sovereign *de facto* of Port au Prince; that Petion and Christophe are at war with each other, each declaring the other to be in rebellion against France; but each claiming to have authority in his own dominions: that they have their custom houses and custom house officers: and ships of many nations, English, Spanish, American, &c. trade there, and business is regularly transacted; that the United States have had a consul at Cape François, since the government has been in rebellion against France: particularly that Col. Lear was consul there when Toussaint was regent: that protests, decrees, and other proceedings of the admiralty courts from Cape François are frequently seen in the United States: and that a proclamation of the blockade of Port au Prince by Christophe, or king Henry, was published here in June, 1812.¹

The judge instructed the jury that the decree must be considered as conclusive evidence that the vessel was condemned for violation of blockade.

The jury accordingly returned a verdict for the defendants, which was taken subject to the opinion of the court in the premises. If that

¹ Part of the statement of facts and part of the opinion, involving the claim of partial loss, are omitted. — ED.

opinion should be, that the said decree does decide and is conclusive evidence of a violation of blockade by the vessel the verdict was to stand: otherwise the defendants were to be defaulted, and judgment was to be rendered for a total or partial loss, in such sum as, upon the facts before stated, the court should determine the plaintiffs ought to recover.

PARKER, C. J. The decree offered in this case, as conclusive evidence of a violation of blockade by the vessel insured, cannot be held so to operate. Indeed it may be doubtful whether it ought to have been admitted at all.

Waiving all question as to the character of the government, under which the seizure of the vessel and the decree of forfeiture took place, it certainly is essentially defective when attempted to be applied to this contract of insurance.

For it does not appear that any libel was filed, any monition issued, any hearing had, or that any of those formalities had taken place, which are necessary to give a conclusive operation to decrees of foreign courts. For aught that appears from the copy of the proceedings before us, the forfeiture was decreed by mere arbitrary power, without any trial; and that some of the forms of justice, used in civilized countries, had been assumed, without any regard to the substantial requisites of a judicial inquiry.

Considering the decree then as not conclusive, the facts, which it purports to establish, are abundantly disproved by the other testimony in the case: so that the seizure of the vessel must be taken to have been an act of unjustifiable violence, for which the underwriters are undoubtedly answerable. . . .

*Defendants defaulted.*¹

¹ But see *The Helena*, 4 C. Rob. 3 (1801). In that case Sir W. SCOTT said: "The ship appears to have been taken by the Algerines, and it is argued that the Algerines are to be considered in this act as pirates, and that no legal conversion of property can be derived from their piratical seizure. . . . Although their notions of justice, to be observed between nations, differ from those which we entertain, we do not, on that account, venture to call in question their public acts. As to the mode of confiscation, which may have taken place on this vessel, whether by formal sentence or not, we must presume it was done regularly in their way, and according to the established custom of that part of the world. That the act of capture and condemnation was not a mere private act of depredation, is evident from this circumstance, that the Dey himself appears to have been the owner of the capturing vessel; at least he intervenes to guarantee the transfer of the ship in question to the Spanish purchaser. There might perhaps be cause of confiscation, according to their notions, for some infringement of the regulations of treaty; as it is by the law of treaty only that these nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations, but that which is derived from positive compact and convention. Had there been any demand for justice in that country on the part of the owners, and the Dey had refused to hear their complaints, there might perhaps have been something more like a reasonable ground to induce this court to look into the transaction, but no such application appears to have been made. The Dey intervened in the transaction as legalizing the act."

In *Fracis v. Carr*, 82 L. T. Rep. 698 (1900), WILLIAMS, L. J., said: "We are not satisfied that the document issued by the Muscat court was an adjudication by a court

FOOTE v. NEWELL.

SUPREME COURT, MISSOURI. 1860.

[Reported 29 Missouri, 400.]

SCOTT, J.,¹ delivered the opinion of the court.

This is an action on what is alleged to be a judgment of the court of a sister state.

The petition states that the plaintiff, at a term of the Circuit Court for Wayne County, in the State of Indiana, on the 2d day of November, 1840, recovered a judgment in debt for \$201.25 against the defendants Curtis, Newell, and Hiram Morlan; that afterwards, in November, 1840, an execution issued on said judgment against said defendants indorsed by the clerk of said court; that the same was for making the sum therein named with interest therefrom from the 4th of November, 1840, and might be replevied according to law; which said execution was afterwards, to wit, on the 30th day of January, 1841, returned by the sheriff of the said county of Wayne, indorsed "replevied by taking a replevin bond" and returning the same to the clerk of said court, executed by the defendants Hiram Morlan, Charles B. Newell, Joshua Cranor, and Harmon Roland, on the 30th day of January, 1841, to the plaintiffs in the sum of \$419.41, conditioned that should the said obligors, or either of them, well and truly pay to the said plaintiffs the said sum of \$201.25, the amount of said judgment, together with the interest and costs accruing and to accrue thereon, at the expiration of the time given by law, the said bond to be null and void; otherwise to remain in full force; which said bond was duly entered by the clerk of said court on the order book of said court; all of which will more fully appear by a duly and legally certified copy of said judgment and bond, with all the proceedings done and had thereon herewith filed. The petition further alleged that by virtue of an act of the general assembly of the State of Indiana entitled "An act subjecting real and personal property to execution" approved January 4, 1831, and in force at the rendition of the said judgment, of issuing said execution, and of taking, returning, and entering said bond on the order book of said court, the said bond, so entered into by the said obligors and so entered on the order book of said court, became, and from the date thereof had

of justice determining the status or ordering the disposition of goods seized within Muscat territory; and we wish to add that, even if we were so satisfied, we should hesitate to hold that our courts ought to give effect to a judgment as to which there is no evidence of any public notice of the intention to hold the inquiry which resulted in the judgment. But quite apart from any replication impeaching the judgment as against natural justice, the onus of proving which would be on the plaintiffs [who denied the force of the judgment], there seems to be no judgment *in rem*." — Ed.

¹ Part of the opinion, discussing the application of the Statute of Limitations, is omitted. — Ed.

the force and effect of, a judgment confessed in said court by the said obligors so executing the said bond and against their estates, and execution might issue thereon accordingly. The petition then recites some payments on the judgment, and states the balance of it to be \$61.83 with interest, and that the judgment for the amount is still in force and effect and unreversed and unsatisfied; and that the said bond still remains in full force and effect, not reversed, satisfied, or otherwise vacated; whereby an action has accrued to the plaintiffs to demand and have of the defendants the sum of \$419.41, and therefore ask judgment for that amount.

Two of the defendants answered, Joshua Cranor and Chas. Newell, denying that any action accrued on the bond to the plaintiffs whereby they were bound for the sum claimed in the petition. They deny that they were ever served with any process, and plead the statute of limitations of ten years. There were motions to strike out the answer and parts of it, which were overruled. The suit was discontinued as to the defendants not answering. By consent the cause was submitted to the court. The record of the Indiana judgment, and the subsequent proceedings thereon as stated in the petition, were read in evidence. The statute of Indiana was also read in evidence, which directed the bond, executed under the circumstances detailed in the petition, to be taken as, and have the force and effect of, a judgment confessed in a court of record against the person or persons executing the same and against their estates. The court refused an instruction, asked by the plaintiffs, that the act of the legislature of the State of Indiana read in evidence gives to the bond in evidence in this cause the force and effect of a judgment confessed in the Circuit Court of Wayne County, in the State of Indiana, against the parties to said bond, and said judgment is binding and obligatory on the defendants in the courts of this State, and may be sued upon as a judgment of a court of record, and judgment may be recovered on the same in the courts of this State. There was a judgment for the defendants.

The constitution of the United States prescribes that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. The act of Congress of May 26, 1790, pointed out the manner of authenticating the said acts, records, and proceedings, and declared that the records and proceedings should have such faith and credit given them in every court within the United States as they have by law and usage in the courts of the State from whence the said records are or shall be taken. The question involved in this cause is not what faith and credit shall be given to a judicial proceeding of a sister State, but whether the instrument, the foundation of the action, is a judicial proceeding within the meaning of the constitution and the law. Indeed, if this is a judicial proceeding, it is difficult to find a reason why a State may not declare any contract or

undertaking, on being filed with the clerk of a court of record, a judgment by confession and having the force and effect of a judgment, and thus make it a judicial proceeding within the meaning of the Federal Constitution. The statute of Indiana itself did not regard the proceedings under the execution as judicial, for if it had been so regarded it would not have been necessary to declare that the bond be taken as, and have the effect of, a judgment confessed in a court of record. It is not usual for a tribunal performing judicial acts to declare the character of the acts; it is sufficiently apparent from the face of the proceedings themselves.

If a State, in carrying out a policy of her own, disapproved or discountenanced in other States, finds it convenient to give to proceedings having no affinity to judicial ones the force and effect of judgments, the other States are not required by the constitution to give to those acts the force and effect they may have in the State by which they were authorized. Comity requires that nations should respect the judicial proceedings of each other. The constitution exacts this comity between the States as a duty and carries it further than the comity among foreign nations extends. Under these circumstances, it would be great perversion to require the States to give to any contract or undertaking, declared by a State to be a judgment for the sake of a speedy remedy, the force and effect of a judicial proceeding. The bond is a penal one, being for a sum double the amount of the original judgment. We know how to deal with a penal bond; but what is to be done with a penal judgment? The plaintiffs claim the amount of the penal bond, which they maintain is a judgment within the meaning of the constitution of the United States. We are not informed whether, by the law of Indiana, an execution issues for the entire penalty, or for the amount due on the original judgment. We may form a conjecture on this subject, but how singular in judicial proceedings is a judgment for a penal sum to be discharged by the payment of a less at a given time, otherwise to remain in full force. The statutory proceedings and judgment on a penal bond furnish no support to such a course. In such cases, the amount of the damages is ascertained for which the execution is awarded. Can this judgment be said to be final and complete at the date of the bond, if its existence or non-existence is made by its terms to depend on the happening of a future event? Before the courts here can declare that this is a judgment to be carried into effect under the constitution, must not the court of the State, where it was rendered, have previously determined whether the event had occurred on which its validity is made to depend? If our courts do this, are they not merely rendering a judgment in the first instance ancillary to the foreign courts, not carrying their judgments into effect, but aiding them in forming the original judgment?¹

¹ *Acc. Sevier v. Roddie*, 51 Mo. 580. — ED.

REYNOLDS v. STOCKTON.

SUPREME COURT OF THE UNITED STATES. 1891.

[*Reported 140 United States, 254.*]

ERROR from the Court of Chancery of the State of New Jersey.

The facts are these: In the year 1872 there were two life insurance companies; one the The New Jersey Mutual Life Insurance Company, a New Jersey corporation, doing business at Newark, New Jersey, and the other the Hope Mutual Life Insurance Company, a New York corporation, doing business in the city of New York. In December of that year an agreement was made between the two companies by which the New Jersey company reinsured the risks of the New York company, took its assets and assumed its liabilities. From that time the business of the two companies was done in the name of the New Jersey company, until January, 1877, when that company failed, and its assets were taken possession of by the New Jersey Court of Chancery, which appointed Joel Parker receiver. Subsequently he was appointed ancillary receiver by the Supreme Court of New York, in a suit instituted therein by the attorney general of New Jersey, and William Geasa, a creditor; and as such ancillary receiver, received the sum of \$17,040.59. Prior to 1886, he resigned his position as receiver under appointment of the Court of Chancery of New Jersey, and was succeeded by Robert F. Stockton, the present receiver. No substitution was made in New York in respect to the ancillary receivership. On March 22, 1886, an order was entered in the suit pending in the Supreme Court of New York, making certain allowances to counsel, referee, and receiver out of the funds in the hands of the ancillary receiver, and directing him to pay over the balance to the receiver appointed by the Court of Chancery of New Jersey, and discharging him, and the sureties on his bond as ancillary receiver, from all further liability, on compliance with this order. This order was complied with, and the balance of the funds turned over to the New Jersey receiver. Subsequently to these proceedings, and on the 11th day of October, 1886, a judgment was entered in the Supreme Court of the State of New York as follows: "It is adjudged that the plaintiffs recover of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and against the New Jersey Mutual Life Insurance Company, the sum of one million and ten thousand four hundred and ninety-six dollars and twenty-nine cents, the money so recovered to be brought by the plaintiffs into court and distributed in accordance with the provisions of the original decree herein, and such further directions as may be made by the court herein on the application of any party in interest."

This is the judgment whose non-acceptance by the Court of Chancery

in New Jersey produces the present controversy. The contentions of the defendant are that this judgment was entered in the absence of the defendant, and was not responsive to the issues presented by the pleadings, and therefore might rightfully be ignored by every other tribunal; and, secondly, that if by any strained construction of the pleadings it could be held responsive thereto, it was entered against a party who had ceased to have the right to represent the defendant's interest, and, because of the absence of the real representative of the defendant's interest, was a judgment in a suit *inter alios*, and not obligatory upon the defendant.

For a clear understanding of the questions presented by these defences a further statement of facts is necessary. Prior to the reinsurance, and when the New York company was acting as an independent company, it had, in obedience to the laws of New York, deposited with the superintendent of the insurance department of that State one hundred thousand dollars, in accepted securities, as a fund for the protection of its policy holders. After the contract of reinsurance, after the failure of the New Jersey company, and the appointment of Parker as its receiver, and after his appointment as ancillary receiver by the court of New York, and on February 7, 1889 [1879], a suit was commenced in the Supreme Court of New York, entitled as follows:

“New York Supreme Court, Kings County.

“Henry E. Reynolds, individually, and Henry E. Reynolds as Executor, and Georgiana L. Reynolds as Executrix of the last will and testament of Moses C. Reynolds, deceased; Hervey B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John P. Traver, Plaintiffs,

against

“John F. Smith, as Superintendent of the Insurance Department of the State of New York; The Hope Mutual Life Insurance Company of New York; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company; and the said The New Jersey Mutual Life Insurance Company; Defendants.

} Complaint.”

The plaintiffs in that suit were policy holders in the New York company, with one exception, and that is the last-named plaintiff, who was a stockholder therein. This suit was obviously *quasi in rem*, one to seize and appropriate to the claims of these various plaintiffs the securities deposited by the New York company, as a trust fund, with the superintendent of the insurance department.

On October 11, 1886, the judgment was entered in favor of the

plaintiffs for one million and odd dollars, as heretofore stated. The Court of Chancery of New Jersey, when this judgment was presented, declined to recognize this as an adjudication against the existing receiver or the assets of the insurance company in his hands.¹

BREWER, J. We are of opinion that the decision of the Chancery Court of New Jersey, as sustained by the Court of Errors and Appeals of that State, is correct, and must be affirmed. The first and obvious reason is that the judgment of the Supreme Court of New York was not responsive to the issues presented. The section of the Federal Constitution which is invoked by plaintiffs is section 1 of Article IV., which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other State in and of themselves require. It does not demand that a judgment rendered in a court of one State, without the jurisdiction of the person, shall be recognized by the courts of another State as valid, or that a judgment rendered by a court which has jurisdiction of the person, but which is in no way responsive to the issues tendered by the pleadings, and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other State. The requirements of that section are fulfilled when a judgment rendered in a court of one State, which has jurisdiction of the subject-matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another State. The scope of this constitutional provision has often been presented to and considered by this court, although the precise question here presented has not as yet received its attention. It has been adjudged that the constitutional provision does not make a judgment rendered in one State a judgment in another State upon which execution or other process may issue; that it does not forbid inquiry in the courts of the State to which the judgment is presented, as to the jurisdiction of the court in which it was rendered over the person, or in respect to the subject-matter, or, if rendered in a proceeding *in rem*, its jurisdiction of the *res*. Without referring to the many cases in which this constitutional provision has been before this court, it is enough to notice the case of *Thompson v. Whitman*, 18 Wall. 457. The view developed in the opinion in that case, as well as in prior opinions cited therein, paves the way for inquiry into the question here presented. If the fact of a judgment rendered in a court of one State does not preclude inquiry in the courts of another, as to the jurisdiction of the court rendering the judgment over the person or the subject-matter, it certainly also does not preclude inquiry as to whether the judgment so

¹ The statement of facts has been somewhat condensed. Arguments of counsel are omitted. — ED.

rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it. Take an extreme case: Given a court of general jurisdiction, over actions in ejectment as well as those in replevin; a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same State. If not there, the constitutional provision quoted gives no greater force to the same record in another State.

We are not concerned in this case as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. And without amendment of the pleadings, a judgment for the recovery of the possession of real estate, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted. Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a State, as to all subsequent inquiries in the courts of the same State, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one State to judgments rendered in the courts of another State.¹

¹ The learned judge here cited and examined the following cases: *Munday v. Vail*, 34 N. J. L. 418; *Unfried v. Herberer*, 63 Ind. 67; *Goucher v. Clayton*, 11 Jur. (N. S.)

But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action, and in that suit service on, or appearance of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same State; and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another State.

This proposition determines this case; for, as has been shown, the scope and object of the suit in the New York court was the subjection of the fund in the hands of the superintendent of the insurance department of that State to the satisfaction of claims against the New York company. The cause of action disclosed in the original complaint was not widened by any amendment; and there was no actual appearance by the receiver Parker or the New Jersey company subsequently to the filing of their answer. No valid judgment could, therefore, be rendered therein, which went beyond the subjection of this fund to those claims.

But another matter is also worthy of notice. At the time of the rendition of this judgment in the Supreme Court of New York, Parker had lost all authority to represent the New Jersey company. His authority in New Jersey, the State of primary administration, had been transferred to Stockton, the present receiver. By a decree in the very court, and in the very suit in the State of New York, in which he had been appointed ancillary receiver for that State, a decree had been entered discharging him from further power and responsibility. If it be said that the attention of the court in which the judgment in question was entered had not been called to this loss of representative power on the part of Parker, a sufficient reply is, that if the power was gone it is immaterial whether the court knew of it or not. Whatever reservation of power a court may have by *nunc pro tunc* entry to make its judgment operative as of the time when the representative capacity in fact existed, it is enough to say that no exercise of that power was attempted in this case. Suppose it had been, or suppose that Parker, as ancillary receiver, had not been discharged by any order in the New York court, would the administration of this estate in the Chancery Court of New Jersey, through a receiver appointed by it, or the assets in the hands of such receiver, be bound by this decree entered in the court of New York? Clearly not. The idea which underlies this runs through all administration proceedings, and has been recently considered by this

court in the case of *Johnson v. Powers*, 139 U. S. 156. If Parker had still remained the ancillary receiver in the State of New York, a judgment rendered against him as such would bind only that portion of the estate which came into his hands as ancillary receiver, and would not be an operative and final adjudication against the receiver appointed by the court of original administration. Where a receiver or administrator or other custodian of an estate is appointed by the courts of one State, the courts of that State reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the State. Whatever orders, judgments, or decrees may be rendered by the courts of another State, in respect to so much of the estate as is within its limits, must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another State, come within the same rule of conclusiveness. Beyond this, the proceedings of the courts of a State in which ancillary administration is held are not conclusive upon the administration in the courts of the State in which primary administration is had. And this rule is not changed, although a party whose estate is being administered by the courts of one State permits himself or itself to be made a party to the litigation in the other. Whatever may be the rule if jurisdiction is acquired by a court before administration proceedings are commenced, the moment they are commenced, and the estate is taken possession of by a tribunal of a State, that moment the party whose estate is thus taken possession of ceases to have power to bind the estate in the court of another State, either voluntarily or by submitting himself to the jurisdiction of the latter court. So, as *Stockton*, the receiver appointed by the Chancery Court of New Jersey, the court having primary jurisdiction, was not a party to the proceedings in the New York court, and was not authoritatively represented therein, the judgment, even if responsive to the issues tendered by the pleadings, was not an adjudication binding upon him, or the estate in his hands.

For these reasons the decree of the court below was correct, and it is *Affirmed.*

NOUVION v. FREEMAN.

HOUSE OF LORDS. 1889.

[*Reported 15 Appeal Cases, 1.*]

LORD HERSCHELL.¹ My Lords, this appeal arises in an action brought by the appellant, the plaintiff below, for the administration of the estate of a deceased gentleman named Henderson. In order to found

¹ The opinion of Lord HERSCHELL only is given. Lords WATSON and BRAMWELL delivered concurring opinions. — ED.

his claim to an order for the administration of that estate it became necessary for him to show that he was a creditor of the deceased. The case presented by him for the purpose of making that out was that he had obtained a judgment of a foreign court upon which he was entitled to sue in this country, and which in this country established the existence of a debt. Under those circumstances the court ordered that there should be first tried the issue, "whether the judgment or decree" upon which he relied, one pronounced on the 5th of April, 1878, "and the other judgments or decrees whereof particulars have been delivered, or any and which of them, are orders or judgments upon which the claim of the plaintiff in this action or some and what part of it can be sustained."

It appears that Mr. Henderson, the administration of whose estate is in question, had purchased certain properties in the district of Seville of the plaintiff, Mr. Nouvion, and that the deeds by which these properties were conveyed, and which contained an obligation to make certain payments, were registered in the registry of the district of San Roman, and where deeds of that description are so registered, according to the law of Spain, the person who is entitled to payment under them can obtain what is called an "executive" judgment.

It is necessary to state distinctly what the nature of that judgment is; because I think it will be found that the decision of your Lordships must be determined by that consideration. In an action of this nature only a very limited number of defences can be raised by the person sued. He cannot impeach the instruments upon which the action is founded, or show that they were obtained by fraud, or that on any other ground they did not properly form the basis of an obligation on his part. He can only defend himself by such defences as are open to him on the assumption that the deeds were valid, and in the first instance did create the obligation. He may show that there has been a waiver, or that he has discharged the obligation by payment or otherwise, but substantially I think those are the only defences open to him. It is open to either of the parties to such an instrument to sue in the same court in another form of action, which is called a declaratory or plenary action, and which is said to be the ordinary course, not as meaning that the other is a course which can only be taken under exceptional circumstances, but that the one conforms to the general and ordinary rules of procedure in an action in the Spanish courts, and that the other is a special procedure allowed in particular cases. In such a plenary action, to which either of the parties may have recourse, every defence which may be available is open as well as every consideration establishing the ground of action; and such a plenary action may be instituted by either of the parties to the executive action; that is to say, the party against whom the decision has been pronounced in the executive action, be he plaintiff or defendant, is at perfect liberty to sue in a plenary action for the purpose of obtaining a declaration of the rights of the parties; and in such a plenary action

the fact that a judgment has been delivered in an executive action can, not be set up as at all affecting the rights of the parties, either in the way of proof or of title to succeed in the plenary action. The same points which have been decided in the executive action can again be raised in the plenary action, as well as other questions which were not open in the executive action. No effect is given, in the court in which it was pronounced and in which afterwards the plenary action may be pending, to the judgment in the executive action as being *res judicata* and as finally concluding the rights of the parties upon any point whatever.

My Lords, in the present case the plaintiff, Mr. Nouvion, who was a party to the agreements which I have mentioned, and which had been duly registered, brought an executive action, and in that executive action a decree was pronounced in these terms: "Let an order of execution be issued against the property and goods of Mr. William Henderson for the principal amount of 697,135 reales, 60 centimos, and also for the amount of the legal interests thereon from the date of default being made by not meeting" certain drafts which are there mentioned.

It appears that owing to the absence of Mr. Henderson from Spain it became necessary, in accordance with the procedure of the Spanish courts, to send letters requisitorial to this country, that is to say, to Scotland, where Mr. Henderson was resident, and to obtain from the Spanish consul in Scotland a return to those letters, which intimated that Mr. Henderson had not discharged, as he would then have had an opportunity of doing, the liability which was declared by the judgment. Thereupon Mr. Henderson having intervened and having alleged that the debt was not due by reason of a promise of the plaintiff not to sue him, and that point having been decided against him, a decree was made which I think may properly be termed a final decree in that action, that the distraint be carried into effect, "and in virtue thereof sale by auction be made of the property attached, and out of the proceeds thereof entire and complete payment to the executive plaintiff of the amount of the principal demanded" with interest and costs.

My Lords, the plaintiff relies upon that judgment as being sufficient to entitle him, when he sues upon it in the courts of this country, to a judgment for the amount of the debt for which it was ordered that execution should issue, and the only question in this case is whether, under the circumstances which I have mentioned, that judgment is sufficient to entitle him in the courts of this country to a judgment for his debt as being a creditor of the deceased person, Mr. Henderson.

Now, my Lords, there can be no doubt that in the courts of this country, effect will be given to a foreign judgment. It is unnecessary to inquire upon what principle the courts proceed in giving effect to such a judgment, and in treating it as sufficient to establish the debt. Reliance was placed upon a dictum by Parke, B., and Alderson, B., in the case of *Williams v. Jones*, 13 M. & W. 628, 633, where

the law is thus stated: "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." But it was conceded, and necessarily conceded, by the learned counsel for the appellant, that a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a court of competent jurisdiction, such judgment being final and conclusive. I shall of course have something to say upon the meaning which must be given to those words, but the general proposition in that form is not disputed by the learned counsel for the appellant. They contend that this judgment is final and conclusive, and no doubt in a certain sense that must be conceded. It puts an end to and absolutely concludes that particular action. About that there can be no manner of doubt—in that sense it is final and conclusive. But the same may be said of some interlocutory judgments upon which there can be no question that an action could not be maintained; they do settle and conclude the particular proceeding, the interlocutory proceeding, in which the judgment is pronounced. It is obvious, therefore, that the mere fact that the judgment puts an end to and finally settles the controversy which arose in the particular proceeding, is not of itself sufficient to make it a final and conclusive judgment upon which an action may be maintained in the courts of this country, when such judgment has been pronounced by a foreign court.

My Lords, I think that in order to establish that such a judgment has been pronounced it must be shown that in the court by which it was pronounced it conclusively, finally, and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties. If it is not conclusive in the same court which pronounced it, so that notwithstanding such a judgment the existence of the debt may be between the same parties be afterwards contested in that court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our courts for the payment of that debt.

The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the courts of another country

we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation. But where, as in the present case, the adjudication is consistent with the non-existence of the debt or obligation which it is sought to enforce, and it may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt, it appears to me that the very foundation upon which the courts of this country would proceed in enforcing a foreign judgment altogether fails.

It has been suggested that a judgment obtained in an "executive" action may be regarded as analogous to a judgment obtained in a common law action in the time prior to the Judicature Act, the execution of which might be restrained by a Court of Equity, so as to prevent the plaintiff who had succeeded in such an action from obtaining the fruits of his judgment. I do not think that such an analogy is a complete one; but even if it were more complete than I think it to be, it appears to me that it would afford very little assistance to your Lordships unless we could know what had been the course adopted with regard to such judgments in countries in whose system of law the same force and effect are given to foreign judgments as are given in the courts of this country. Upon that point we have had no information whatsoever.

Then, my Lords, it is said that such a judgment is analogous to a judgment which has been obtained upon which a suit may be instituted in the courts of this country, even although an appeal may be pending. It appears to me that there is a vital distinction between the two cases. Although an appeal may be pending, a court of competent jurisdiction has finally and conclusively determined the existence of a debt, and it has none the less done so because the right of appeal has been given whereby a superior court may overrule that decision. There exists at the time of the suit a judgment which must be assumed to be valid until interfered with by a higher tribunal, and which conclusively establishes the existence of the debt which is sought to be recovered in this country. That appears to me to be in altogether a different position from a "remate" judgment, where the very court which pronounced the "remate" judgment (not the Court of Appeal) may determine, if proper proceedings are taken, that the debt for which this "remate" judgment is sought to be used as conclusive evidence has no existence at all.

My Lords, the plaintiff in such a suit, an executive suit, is not, by the decision which is now under appeal, deprived of his rights. He may still sue upon the original cause of action. Of course it may happen, as in this particular case, that such a suit is barred by lapse of time, but that is an accident. The right of the plaintiff to sue on his original cause of action is not at all interfered with by the judgment which has been pronounced; and in such an action, if it were brought, all questions upon which the rights of the parties depend, and by the solution of which the obligation to pay must ultimately be determined,

would be open to consideration and could be dealt with by the courts, and finally and conclusively settled. I do not, therefore, see that there is any wrong or any hardship done by holding that a judgment which does not conclusively and forever as between the parties establish the existence of a debt in that court cannot be looked upon as sufficient evidence of it in the courts of this country.

Very ingenious arguments have been urged upon your Lordships by the learned counsel for the appellant, and they have strenuously contended that the proper course would be to permit such a judgment to be sued upon and that justice might be done by staying proceedings as might be done in the case of an English judgment sued upon, which was under appeal.

But no authority has been cited, no case has been referred to, which supports the view put forward on the part of the appellant that an action upon such a judgment as this could be maintained, and I certainly cannot advise your Lordships to make such a precedent, because it appears to me, after giving due weight to all the arguments of the learned counsel for the appellant, that on the whole the result would as a general rule be likely to be mischievous and to work injustice rather than justice between the parties.

For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.¹

PAINE v. SCHENECTADY INSURANCE CO.

SUPREME COURT OF RHODE ISLAND. 1877.

[Reported 11 Rhode Island, 411.].

DURFEE, C. J. This is an action of assumpsit to recover damages for breach of contract. It was commenced in the court of Common Pleas, August 27, 1870. The plaintiff recovered judgment in that court at the December Term, 1875. The defendant appealed to this court at the March Term, 1876. May 13, 1876, the defendant filed a plea *puis darrein continuance*, setting forth that on the 8th May, 1876, George T. Hanford, who had been duly appointed receiver of the goods and effects of the defendant, had impleaded the plaintiff in the Supreme Court, in the State of New York, and recovered judgment against him for \$1,878.11, and costs, "which still remains in full force and effect, not in any wise reversed, annulled, discharged, or satisfied." The plea sets forth the proceeding in the New York suit, showing that the plaintiff therein pleaded in set-off the matters involved in this case, and

¹ So of an interlocutory decree. Board of Public Works v. Columbia College, 17 Wall. 521; Baugh v. Baugh, 4 Bibb. 556. See Griggs v. Becker, 87 Wis. 313, 58 N. W. 396.

avers that the cause of action and the issue raised by the pleadings are the same in both suits, and that the parties are identical. To this plea the plaintiff demurs, assigning four causes of demurrer.

The first cause is, that the suit set forth in the plea is not alleged to have been instituted before the commencement of the present suit. And in his brief, the counsel for the plaintiff contends that there is no precedent for such a plea where the judgment was recovered by the defendant, or was recovered in a suit commenced subsequently to the suit in which it was pleaded.

We do not see that it makes any difference which party has recovered judgment. The true question is, whether the controversy has been determined by a competent tribunal having jurisdiction; for, if it has been, the defendant has the right to insist that it shall not be further prosecuted, unless for some technical reason he cannot have the benefit of the estoppel. The plaintiff says he cannot have the benefit of the estoppel because the suit in this State was first commenced. Is this so? We think not. The defendant had the right to sue the plaintiff in New York, notwithstanding the plaintiff had sued him in Rhode Island. The plaintiff, in defending against the New York suit, put in issue the same controversy which was in issue in the Rhode Island suit, and it was decided against him. Why should he not be concluded, and, if concluded, why should not the defendant have the benefit of the conclusion by plea *puis darrein*? If the judgment in New York had been recovered before the suit in Rhode Island, the defendant would certainly have been entitled to plead it. Indeed, such a judgment would be pleadable in bar if recovered in a foreign country, and *a fortiori*, under the Federal Constitution and law, when recovered in a sister State. *Ricardo v. Garcias*, 12 Cl. & Fin. 368; *Bissell v. Brigg*, 9 Mass. 462; *Mills v. Duryee*, 7 Cranch, 481; 2 Am. Lead. Cas. (5th ed.) 611 *et seq.*, where this subject is discussed, and the cases fully cited.

The two cases of *Baxley v. Linah*, 16 Pa. St. 241, and *North Bank v. Brown*, 50 Me. 214, are closely in point. In *Baxley v. Linah*, 16 Pa. St. 241, an action was commenced in Maryland, December 30, 1846, and in Pennsylvania, for the same cause, June 2, 1847. The defendant pleaded the prior pendency of the Maryland action in abatement to the Pennsylvania action, and the plea was overruled, the plea of prior pendency being available only when both actions are pending in the same State. *Bowne et al. v. Joy*, 9 Johns. Rep. 221; *Walsh et al. v. Durkin*, 12 Johns. Rep. 99. Subsequently, January 31, 1848, the plaintiff recovered judgment against the defendant in the Maryland action; and December 5, 1849, the defendant pleaded it in bar *puis darrein continuance*. The plaintiff demurred. The court, however, sustained the plea.

The only material difference between that case and the case at bar is, that there the judgment was recovered first in the earlier case, here in the later. But the judgment, whenever recovered, is still a judg-

ment; and why, then, is it not pleadable as such? In *North Bank v. Brown*, 50 Me. 214, the plaintiff commenced suit against the defendant in Maine, January 11, 1858; and in New York for the same cause, January 21, 1858. Judgment was first obtained in the New York suit, and it was held to be a good defence to the suit in Maine. Here the judgment does not appear to have been specially pleaded; but if it had been specially pleaded, we see no reason why the decision would not have been the same. We think the first cause of demurrer is not sufficient.¹

The second cause is, that it does not appear that the New York suit was prosecuted by or for the defendant corporation, or by its authority, or for its benefit.

The plea sets forth that the New York suit was prosecuted by George T. Hanford, as receiver of the goods and effects of the defendant, and avers that the parties are identical; meaning, doubtless, that they are in legal effect the same. We infer from this that, under the laws of New York, the receiver, for the purposes of his appointment, is virtually the corporation, and that therefore a suit by him as receiver is, in legal effect, a suit by the corporation. We the more readily infer that the law is so in New York, because it is so in this State. We think, when the judgment of a sister State is pleaded, we ought not to be too strict or technical; but that we ought to administer the law in a spirit of liberal comity, and to allow the plea every fair intendment, so as not to defeat the constitutional privilege of the judgment. If this suit were pending in New York such a judgment would doubtless be a bar to it. We think, therefore, that the second cause of demurrer cannot be sustained.

The third cause of demurrer is substantially the same as the second, and is for the same reason overruled.

The fourth cause is, that the cause of action in the two suits does not appear to be identical. The plea avers that it is identical, and we do not find, from an examination of the judgment as pleaded, any sufficient reason to think it is not so. See *Ricardo v. Garcias*, 12 Cl. & Fin. 368, 401.

The plaintiff states in his brief that an appeal has been taken from the judgment rendered in New York. The plea, however, does not show this. *Primâ facie* the judgment as pleaded appears to be final and conclusive. Upon demurrer, we can only know what the plea discloses. If the plaintiff desires us to decide upon the effect of the appeal, he should bring the fact of the appeal before us by proper pleading and proof.

Upon the question whether the court can take cognizance of the

¹ *Acc. Cox v. Mitchell*, 7 C. B. N. s. 55; *Memphis & C. R. R. v. Grayson*, 88 Ala. 572, 7 So. 122; *Seever v. Clement*, 28 Md. 426; *Whiting v. Burger*, 78 Me. 287; *Lane v. Hanson*, 25 Can. 69. See the *Santissima Trinidad*, 7 Wheat. 283, 355; *Lyman v. Brown*, 2 Curt. 559; *Thorpe v. Sampson*, 84 Fed. 63. — Ed.

New York law as to the effect of an appeal, unless pleaded and proved, see 2 Am. Lead. Cas. (5th ed.) 648 *et seq.*

Demurrer overruled.

After the foregoing opinion, the plaintiff replied to the plea *puis darrein continuance*:—

1. That the judgment of the Supreme Court of New York set forth in the plea had been appealed from, and that the suit wherein judgment had been given was consequently pending in the Supreme Court of New York.

2. That the receiver Hanford acted without authority, and did not institute the New York suit in behalf of the defendant corporation but for himself.

3. That the cause of action in the New York suit was not that in the present case.

All these replications concluded to the country. The defendant demurred to them all.

DURFEE, C. J. This is an action of assumpsit to which the defendant pleads in bar a former judgment recovered in the Supreme Court of the State of New York. The plaintiff replies that the judgment has been appealed from by him, and the suit is still pending in the court. The defendant demurs to the replication.

The defendant contends that by the law of New York an appeal does not vacate the judgment appealed from, but leaves it, until annulled or reversed, conclusive upon the parties.

Two questions arise upon the demurrers:—

1. The first question is, whether we can take judicial cognizance of the law of New York, or must presume it to be the same as ours until it is shown by averment and proof to be different. The decisions upon this point are conflicting, but we think the decision of the Supreme Court of Pennsylvania, in *The State of Ohio v. Hinchman*, 27 Pa. St. 479, rests upon the better reason. The court there held that, when the judgment impleaded is the judgment of a sister State, the court will notice *ex officio* the law of the State in which it was rendered. The reason given for this is, that, in such a case, the court acts under the Constitution and laws of the United States, which require that the judgment shall have in every State the same faith and credit which it has in the State where it was originally rendered. In such a case, it was said, the decision of the State court is reëxaminable in the Supreme Court of the United States, which will, without averment or proof, take cognizance of the law of the State in which the record originates. "It would be a very imperfect and discordant administration," it was further said, "for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows, that in questions of this sort we should take notice of the local laws of a sister State in the same manner the Supreme Court of the United States would do on a writ of error to our judgment." See also

Baxley v. Linah, 16 Pa. St. 241; *Rae v. Hulbert*, 17 Ill. 572, 578; *Butcher v. The Bank of Brownsville*, 2 Kans. 70; 2 Am. Lead. Cas. 648 *et seq.* We think the reasoning is sound, and that it is not satisfactorily met by courts which adopt a different view. *Rape v. Heaton*, 9 Wis. 328, 341.

2. The second question relates to the conclusiveness of the judgment. We find, as claimed by the defendant, that by the law of New York an appeal, though it may stay the execution when proper security is given, does not affect the conclusiveness of the judgment so long as it remains unreversed. A judgment so appealed from is a valid bar to an action involving the same controversy. *Sage v. Harpending*, 49 Barb. S. C. 166; *Harris v. Hammond*, 18 How. Pr. 123; *Rathbone v. Morris*, 9 Ab. Pr. 213; *Freeman on Judgments*, § 328. If the judgment would be a good bar to this action in New York, it is entitled to have the same effect in this State. *Mills v. Duryee*, 7 Cranch, 481; *McElmoyle v. Cohen*, 13 Pet. 312; *Jacquette v. Hugunon*, 2 McLean, 129. The case of *Bank of North America v. Wheeler*, 28 Conn. 433, is a case exactly in point. After the commencement of that case in Connecticut, a judgment was recovered for the same cause of action in New York, and it was held that the judgment, notwithstanding it had been appealed from, was a good bar to the suit in Connecticut; it being found that, by the law of New York, the appeal operated only as a proceeding in error and did not vacate the judgment. We think, therefore, that the demurrer to the first replication must be sustained.

We will add, however, as matter of practice, that we think the pendency of the appeal in New York may be good ground for delaying judgment here until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive effect, whereas in New York, if the appeal is successful, it will be conclusive only for a short time.

There are two other replications which are demurred to; but we think they raise issues of fact, which the plaintiff is entitled to have tried. The demurrers to them are, therefore, overruled.¹

A. v. H.

REICHSGERICHT. 1886.

[*Reported 16 Entscheidungen des Reichsgerichts, Civilsachen, 427.*]

THE defendants, as acceptors of several bills of exchange drawn and payable at Vienna, had been subjected by the Commercial Court of

¹ *Acc. Scott v. Pilkington*, 2 B. & S. 11; *Taylor v. Shew*, 39 Cal. 536; *Bank of North America v. Wheeler*, 28 Conn. 433; *Tompkins v. Cooper*, 97 Ga. 631, 25 S. E. 247; *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761; *Faber v. Hovey*, 117 Mass. 107; *Loneragan v. Loneragan*, 55 Neb. 641, 76 N. W. 16; *Merchants' Ins. Co. v. DeWolf*, 33 Pa. 45; *Piedmont & A. L. Ins. Co. v. Ray*, 75 Va. 821; *Ferand v. Dreyfus* (Naples), 1 Ann. Giur. Ital. 1, 120. See *Heckling v. Allen*, 15 Fed. 196. — Ed.

Vienna at the suit of St., the bearer of the bills, to an order to pay ("Zahlungsauftrag.") By this order he was enjoined to pay the amount of the bills, with interest and costs, within three days or suffer execution. The order to pay, not being served upon the defendants by reason of their absence, was served upon a curator appointed for them by the Commercial Court, and after notification in due form by the court it acquired executory force. On the basis of this act the plaintiff, as assignee of St., sued the defendants, now domiciled at Berlin, and demanded that the defendants should be adjudged to pay the amount of the order to pay, or in other words that that order should be declared executory.

THE COURT. The Court of Appeal attributes to the order to pay of the Commercial Court of Vienna, passed August 22, 1877, the quality of a binding judgment, finds that the requirements of the Code of Procedure, section 661, for declaring the judgment of a foreign court executory within the country are fulfilled, and therefore adjudges that the defendants pay the plaintiff's demand. The reasons for appeal are unsound in so far as they deny that the order to pay is executory according to section 661 of the Code of Procedure. In particular, the plaintiffs in error assert wrongly that it is not a binding judgment, but merely an *ex parte* direction. It is not here a question of the meaning and effect of such an order to pay according to the Austrian law (a question withdrawn from the examination of this court on appeal by section 511 of the Code of Procedure), but whether this order constitutes a judgment within the meaning of section 661 of the Code of Procedure, which is within the jurisdiction of this court. This question has been rightly decided by the Court of Appeal. By the word "judgments" in section 661 are doubtless meant such judicial decisions as put an end to a suit between parties on the basis of an ordinary or summary process which secures a hearing to both parties. It is not necessary that both parties should appear in the proceedings; judgments by default may also be declared executory, according to section 661, No. 4. Orders to pay such as that now in question are judgments in this sense. According to the Ordinance of the Austrian Minister of Justice of 1850 (Reichsgesetzbl. No. 5 a), in a suit upon a bill of exchange when the plaintiff produces the original of the bill and the accessorial documents, and there are no circumstances of suspicion, the court may on motion of the plaintiff order the debtor on the bill, without a hearing on the merits, to pay the amount of the bill with costs within three days, on penalty of execution according to commercial law (section 5); the debtor who has been ordered to pay in this way must within the space of three days from the notification of the order of court present to the court and support all his objections (section 7)⁴; if within three days he has not paid nor filed objections, the order to pay becomes of itself, by expiration of the period of delay and without further action of the court, binding, and is thenceforth executory. Although the order to pay, which is not in the form of a judgment but of a mere order indorsed or minuted upon the

motion (see Blaschke, *Der österr. Wechselprozess*, 2d ed., p. 57; von Caustein, *Lehrbuch des österr. civilprozesses*, vol. II. p. 466, 509), is in itself only an interlocutory order on motion of the plaintiff and without a previous opportunity to the defendant to be heard, and not a judgment in the sense of section 661 of the Code of Procedure, yet after the expiration of the delay of three days it acquires that character, since the conditional order to pay thereby becomes unconditional, and it is analogous to an ordinary judgment by default. This order to pay, as the Court of Appeal has found in accordance with the Austrian law, having become legally binding, the requirements of section 661, No. 1, have been satisfied.¹ . . .

SECTION II.

THE OBLIGATION OF A JUDGMENT.

GODARD v. GRAY.

COURT OF QUEEN'S BENCH. 1870.

[*Reported Law Reports*, 6 *Queen's Bench*, 139.]

BLACKBURN, J.² In this case the plaintiffs declare on a judgment of a French tribunal, averred to have jurisdiction in that behalf.

The question arises on a demurrer to the second plea, which sets out the whole proceedings in the French court. By these it appears that the plaintiffs, who are Frenchmen, sued the defendants, who are Englishmen, on a charterparty made at Sunderland, which charterparty contained the following clause, "Penalty for non-performance of this agreement, estimated amount of freight." The French court below, treating this clause as fixing the amount of liquidated damages, gave judgment against the defendants for the amount of freight on two voyages. On appeal, the Superior Court reduced the amount to the estimated freight of one voyage, giving as their reason that the charterparty itself "*fixait l'indemnité à laquelle chacune des parties aurait droit pour inexécution de la convention par la faute de l'autre; que moyennant paiement de cette indemnité chacune des parties avait le droit de rompre la convention,*" and the tribunal proceeds to observe that the amount thus decreed was after all more than sufficient to cover all the plaintiffs' loss.

All parties in France seem to have taken it for granted that the words in the charterparty were to be understood in their natural sense; but the English law is accurately expressed in³ *Abbott on Shipping*, part 3, c. 1, s. 6, 5th ed., p. 170, and had that passage been brought

¹ The remainder of the judgment is omitted. — Ed.

² The statement of facts and arguments of counsel are omitted. — Ed.

to the notice of the French tribunal, it would have known that in an English charterparty, as is there stated, "Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may, in such action, recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause, he cannot, in effect, recover more than the damage actually sustained." But it was not brought to the notice of the French tribunal that according to the interpretation put by the English law on such a contract, a penal clause of this sort was in fact idle and inoperative. If it had been, they would, probably, have interpreted the English contract made in England according to the English construction. No blame can be imputed to foreign lawyers for not conjecturing that the clause was merely a *brutum fulmen*. The fault, if any, was in the defendants, for not properly instructing their French counsel on this point.

Still the fact remains that we can see on the face of the proceedings that the foreign tribunal has made a mistake on the construction of an English contract, which is a question of English law; and that, in consequence of that mistake, judgment has been given for an amount probably greater than, or, at all events, different from that for which it would have been given if the tribunal had been correctly informed what construction the English contract bore according to English law.

The question raised by the plea is, whether this is a bar to the action brought in England to enforce that judgment, and we are all of opinion that it is not, and that the plaintiff is entitled to judgment.

The following are the reasons of my Brother MELLOR and myself. My Brother HANNEN, though agreeing in the result, qualifies his assent to these reasons to some extent, which he will state for himself.

It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England and in those States which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams v. Jones*, 13 M. & W. 633: "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced." And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defendant to show that the court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the

jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may show that the judgment was obtained by the fraud of the plaintiff, for that would show that the defendant was excused from the performance of an obligation thus obtained; and it may be that where the foreign court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him; but we prefer to imitate the caution of the present Lord Chancellor, in *Castrique v. Imrie*, Law Rep. 4 H. L. 445, and to leave those questions to be decided when they arise, only observing that in the present case, as in that, "the whole of the facts appear to have been inquired into by the French courts, judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in France in deciding as they did decide."

There are a great many dicta and opinions of very eminent lawyers, tending to establish that the defendant in an action on a foreign judgment is at liberty to show that the judgment was founded on a mistake, and that the judgment is so far examinable. In *Houlditch v. Donegall*, 2 Cl. & F. 477, Lord Brougham goes so far as to say: "The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers; it is their decision that in this country a foreign judgment is only *prima facie*, not conclusive evidence of a debt." But there certainly is no case decided on such a principle; and the opinions on the other side of the question are at least as strong as those to which Lord Brougham refers.

Indeed, it is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a foreign judgment must be demurrable on that ground. The mode of pleading shows that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negating the existence of that original cause of action.

If, on the other hand, there is a *prima facie* obligation to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment. It is quite clear this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal.

But we think it unnecessary to discuss this point, as the decisions of the Court of Queen's Bench in *Bank of Australasia v. Nias*, 16 Q. B. 717; 20 L. J. (C. P.) 284, of the Court of Common Pleas in *Bank of Australasia v. Harding*, 9 C. B. 661, 19 L. J. (C. P.) 345, and of the Court of Exchequer in *De Cosse Brissac v. Rathbone*, 6 H. & N. 301, 30 L. J. (Ex.) 238, seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law.

But there still remains a question which has never, so far as we know, been expressly decided in any court.

It is broadly laid down, by the very learned author of *Smith's Leading Cases*, in the original note to *Doe v. Oliver*, 2 Sm. L. C. 2d ed. 448, that "it is clear that if the judgment appear on the face of the proceedings to be founded on a mistaken notion of the English law," it would not be conclusive. For this he cites *Novelli v. Rossi*, 2 B. & Ad. 757, which does not decide that point, and no other authority; but the great learning and general accuracy of the writer makes his unsupported opinion an authority of weight; and accordingly it has been treated with respect. In *Scott v. Pilkington*, 2 B. & S. 42; 31 L. J. (Q. B.) 89, the court expressly declined to give any opinion on the point not then raised before them. But we cannot find that it has been acted upon; and it is worthy of note that the present very learned editors of *Smith's Leading Cases* have very materially qualified his position, and state it thus, if the judgment "be founded on an incorrect view of the English law, knowingly or perversely acted on;" the doctrine thus qualified does not apply to the present case, and there is, therefore, no need to inquire how far it is accurate.

But the doctrine as laid down by Mr. Smith does apply here; and we must express an opinion on it, and we think it cannot be supported, and that the defendant can no more set up as an excuse, relieving him from the duty of paying the amount awarded by the judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact.

It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a *prima facie* duty to obey the judgment, he must be equally relieved, whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law, and any other mistake. No doubt the English court can, without arrogance, say that where there is a difference of opinion as to English law, the opinion of the English tribunal is probably right; but how would it be if the question had arisen as to the law of some of the numerous por-

tions of the British dominions where the law is not that of England? The French tribunal, if incidentally inquiring into the law of Mauritius, where French law prevails, would be more likely to be right than the English court; if inquiring into the law of Scotland it would seem that there was about an equal chance as to which took the right view. If it was sought to enforce the foreign judgment in Scotland the chances as to which court was right would be altered. Yet it surely cannot be said that a judgment shown to have proceeded on a mistaken view of Scotch law could be enforced in England and not in Scotland, and that one proceeding on a mistaken view of English law could be enforced in Scotland but not in England.

If, indeed, foreign judgments were enforced by our courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our courts would not be so rude as to inquire whether the foreign court had made a mistake, or to allow the defendant to assert that it had, yet that if the foreign court itself admitted its blunder they would not then act: but it is quite contrary to every analogy to suppose that an English court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defence which shows that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law apparent on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers that he can show did exist.

The whole law was much considered and discussed in *Castrique v. Imrie*, Law Rep. 4 H. L. 414, 448, where the French tribunal had made a mistake as to the English law, and under that mistake had decreed the sale of the defendant's ship. The decision of the House of Lords was, that the defendant's title derived under that sale was good, notwithstanding that mistake: Lord Colonsay pithily saying, "It appears to me that we cannot enter into an inquiry as to whether the French courts proceeded correctly, either as to their own course of procedure or their own law, nor whether under the circumstances they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is, whether under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship."

The question in *Castrique v. Imrie*, Law Rep. 4 H. L. 414, was as to the effect on the property of a judgment ordering a ship, locally situate in France, to be sold, and therefore was not the same as the question in this case as to what effect is to be given to a judgment against

the person. But at least the decision in *Castrique v. Imrie*, *supra*, establishes this, that a mistake as to English law on the part of a foreign tribunal does not operate in all cases so as to prevent the courts of this country from giving effect to the judgment.

In the course of the arguments in that case the point now under consideration was raised. In the opinion I delivered at the bar of the House, Law Rep. 4 H. L. 434-435, the cases which are commonly referred to as authorities for the opinion expressed by Mr. Smith in his note to *Doe v. Oliver*, 2 Sm. L. C. 2d ed. 448, are referred to. We have nothing to add to what is there said. And in the case of *Novelli v. Rossi*, 2 B. & Ad. 757, it will be found on perusing the judgment of Lord Tenterden that it does not contain one word in support of the doctrine for which it is cited. We think that case was rightly decided for the reasons given in *Castrique v. Imrie*, Law Rep. 4 H. L. 435; but at all events it does not bear out Mr. Smith's position.

For these reasons we have come to the conclusion that judgment should be given for the plaintiffs.

HANNEN, J. I agree that our judgment should be for the plaintiffs in this case, but as I do not entirely concur in the reasoning by which my Brothers BLACKBURN and MELLOR have arrived at that conclusion, I desire shortly to explain the ground on which my judgment is founded.

I think that the authorities oblige us (not sitting in a court of error) to hold that the defendants, by appearing in the suit in France, submitted to the jurisdiction of the French tribunal, and thereby created a *prima facie* duty on their part to obey its decision; but I do not think that any authority binds us, nor am I prepared to decide that a defendant, not guilty of any laches, against whom a foreign judgment *in personam* has been given, is precluded from impeaching it on the ground that it appears on the face of the proceedings to be based on an incorrect view of the English law, even though there may be evidence that the foreign court, knowingly or perversely, refused to recognize that law.

I do not, however, enter at length upon the consideration of this question, because I have arrived at the conclusion that the defendants in this case were guilty of laches. It does not appear upon the face of the proceedings, nor at all, that the French court was informed of what the English law was. It was the duty of the defendants to bring to the knowledge of the French court the provision of the English law on which they now for the first time rely, and having failed to do so, they must submit to the consequences of their own negligence. The French courts, like our own, can only be informed of foreign law by appropriate evidence, and the party who fails to produce it cannot afterwards impeach the judgment obtained against him on account of an error into which the foreign court has fallen presumably in consequence of his own default. Suitors in our own courts, in similar circumstances, must suffer a like penalty for their negligence. A defendant who has omitted to produce evidence which was procurable at the trial of a cause

cannot have a rehearing on that account; and in an action on a judgment of one of our own courts, we do not permit the defendant to plead any facts which might have been pleaded in the original action. These instances offer analogies by which I think the present case is governed, and on this ground I am of opinion that the defendants are precluded from impeaching the decision of the French tribunal, and that our judgment should be for the plaintiffs.

*Judgment for the plaintiffs.*¹

PEMBERTON v. HUGHES.

COURT OF APPEAL. 1899.

[*Reported Law Reports*, [1899] 1 *Chancery*, 781.]

THIS was an action brought by Mrs. "Sarah Elizabeth Pemberton," who claimed to be the widow of Francis Alexander Richard Pemberton, deceased, asking for a declaration that under a deed-poll executed by him on April 15, 1891, she was entitled to a jointure or rent-charge of £200 per annum issuing out of certain estates in Cambridgeshire devised by the will of one Christopher Pemberton, who died in 1850, to Francis A. R. Pemberton for life with remainder to his first and other sons in tail. On December 20, 1890, the plaintiff went through the ceremony of marriage with F. A. R. Pemberton, then the tenant for

¹ So where a judgment has been obtained, the right being merged in the judgment, no suit can be maintained on the original cause even in another State. *Henderson v. Staniford*, 105 Mass. 504. See *Suydam v. Barber*, 18 N. Y. 468.

The doctrine of the principal case is held in most jurisdictions to-day. *Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714; *Baker v. Palmer*, 83 Ill. 568; *Howland v. C. R. I. & P. R. R.*, 134 Mo. 474, 36 S. W. 29; *Dunstan v. Higgins*, 138 N. Y. 70, 33 N. E. 729. In a few States, however, the old notion that a foreign judgment is *prima facie* evidence of a claim and nothing more, appears still to prevail. *Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158; *Taylor v. Barron*, 30 N. H. 78.

A nonsuit, or any judgment not on the merits, does not create an obligation recognized in another State. *Homer v. Brown*, 16 How. 354; *Hallum v. Dickinson*, 47 Ark. 120; *Rankin v. Barnes*, 5 Bush, 20; *Haws v. Tiernan*, 53 Pa. 192; *Thoms v. King*, 95 Tenn. 60, 31 S. W. 983.

A judgment which has become unenforceable where rendered, in any form of proceeding, because of lapse of time cannot furnish a cause of action in another State. *Chapman v. Chapman*, 48 Kan. 636, 29 Pac. 1071; *St. Louis Type Foundry Co. v. Jackson*, 128 Mo. 119, 30 S. W. 521; *Brown v. Peples*, 10 Rich. Eq. 475; 8 Clunet, 169 (Austria, 30 Oct. '77).

Where by the local practice judgment in an action on a bond is pronounced for the penal sum, but execution issues only for the amount of damages found, it has been held that this may be sued on in another State, but as a judgment for the amount of damages only. *Batley v. Hölbrook*, 11 Gray, 212. In *Dimick v. Brooks*, 21 Vt. 569, it was held that no action at all could be maintained in another State upon such a judgment.

—ED.

life in possession of the devised estates, and the above-mentioned deed-poll was subsequently executed by him in assumed exercise of a power given to him by a second codicil of the testator, whereby, after settling some further estates, the testator empowered every tenant for life who might be in possession of the settled estates under the limitations in his will and second codicil, either in contemplation of or after marriage, by deed "to appoint to or in favor of any woman whom he should marry or have married a yearly rent-charge of £200 or not exceeding that sum, to be issuing out of his said estates or any part thereof, and to commence from the decease of such tenant for life," to be payable half-yearly during the life of such woman for her jointure and in bar of dower.

Francis A. R. Pemberton died on August 2, 1892, without issue, whereupon the plaintiff claimed to be entitled to her jointure under the deed-poll. Her claim was however disputed by the defendants, persons who on F. A. R. Pemberton's death became entitled in possession to the settled estates. The dispute arose under the following circumstances:

In February, 1884, the plaintiff and one Holmes Erwin, who were both domiciled and resident in the State of Florida, were married in that country according to the laws thereof. On January 18, 1888, Erwin — he and the plaintiff being then in Florida — obtained from the Florida court a decree against the plaintiff for divorce on the ground of her violent and ungovernable temper. The plaintiff did not appear to the proceedings, so that they were unopposed.

At the date of the plaintiff's alleged marriage with Francis A. R. Pemberton, which took place in Florida, Erwin was still living and he had, since the divorce, married again; and what the defendants now contended was that the Florida divorce was invalid, because the rules of the Florida court required that "ten days" should "intervene" between the day on which process was issued, by writ of subpoena against the defendant, and the day on which it was "returnable" — called "terminal" days — and that in the present case only nine clear days, in fact, intervened between the day on which the writ of subpoena was issued and the day on which it was returnable. The defendants therefore alleged that at the time when the plaintiff went through the form of marriage with Pemberton she was still the wife of Erwin, and that consequently she was not the widow of Pemberton and not entitled to the jointure as such.

After considering the expert evidence — which was conflicting as to whether the day of service should be counted as one of the "ten" days — and the rules of the Florida court, KEKEWITCH, J., came to the conclusion that the evidence adduced on behalf of the defendants must prevail, and that "intervening" days meant "clear" days, so that the "terminal" days must be excluded from the computation. He also came to the conclusion that this defect in procedure went to the root of the jurisdiction of the Florida court and was fatal to the validity of

the divorce. He accordingly held that the plaintiff's case failed, and dismissed the action with costs.

The plaintiff appealed.¹

LINDLEY, M. R., after stating the facts, and pointing out that the decree for divorce had been made by a court having jurisdiction in Florida to pronounce divorces between persons domiciled and resident in Florida, and had never been set aside or reversed, and now stood as a final and subsisting decree, proceeded: — . . .

Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent — namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.

There is no doubt that the courts of this country will not enforce the decisions of foreign courts which have no jurisdiction in the sense above explained — *i. e.*, over the subject-matter or over the persons brought before them. *Schibsy v. Westenholz*, L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Price v. Dewhurst* (1838), 4 My. & Cr. 76; *Buchanan v. Rucker*, 9 East, 192; *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670. But the jurisdiction which alone is important in these matters is the competence of the court in an international sense — *i. e.*, its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country. This is pointed out by Mr. Westlake (*International Law*, 3d ed. § 328) and by Foote (*Private International Jurisprudence*, 2d ed. 547), and is illustrated by *Vanquelin v. Bouard*, 15 C. B. (N. S.) 341. That was an action on a judgment obtained in France on a bill of ex-

¹ Part of the statement of facts, the arguments of counsel, part of the opinion of LINDLEY, M. R., in which he considered the evidence as to the law of Florida, and the concurring opinions of RIGBY and VAUGHAN WILLIAMS, L. J.J., are omitted. — Ed.

change. The court was competent to try such actions, and the defendant was within its jurisdiction. He let judgment go by default, and in the action in this country on the judgment he pleaded that by French law the French court had no jurisdiction, because the defendant was not a trader and was not resident in a particular town where the cause of action arose. In other words, the defendant pleaded that the French action was brought in the wrong court (see the 13th plea). The Court of Common Pleas held the plea bad, and that the defence set up by it should have been raised in the French action. The French action in *Vanquelin v. Bouard*, *supra*, was an action *in personam*, and the parties to the action in France were also the parties to the action brought in this country on the French judgment. The decision, therefore, does not exactly cover the present case, but it goes far to show that the defendants' contention in this case cannot be supported.

The defendants' contention entirely ignores the distinction between the jurisdiction of tribunals from an international and their jurisdiction from a purely municipal point of view. But that distinction rests on good sense, and is recognized by modern writers on private international law; (see Westlake and Foote (*ubi sup.*) and Piggott on Foreign Judgments, 2d ed. p. 129 *et seq.* He says (p. 130): "The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit."

Wharton's Conflict of Laws § 792 *et seq.*, contains a careful review of the question by a learned American lawyer, and brings out the distinction very clearly: see sections 801, 812. In section 812 he says: "The true test seems to be, competency according to the rules of international law:" and it is plain that these do not include mere rules of procedure.

In Dicey's Conflict of Laws there are some valuable chapters — xi. p. 361, and xvi. p. 400 — on the jurisdiction of foreign courts; and in them will be found various meanings of the expression, "court of competent jurisdiction." These various meanings show the danger of using that expression without taking care to avoid the confusion to which they otherwise give rise.

It may be safely said that, in the opinion of writers on international law, and for international purposes, the jurisdiction or the competency of a court does not depend upon the exact observance of its own rules of procedure. The defendants' contention is based upon the assumption that an irregularity in procedure of a foreign court of competent jurisdiction in the sense above explained is a matter which the courts of this country are bound to recognize if such irregularity involves nullity of sentence. No authority can be found for any such proposition; and, although I am not aware of any English decision exactly to the contrary, there are many which are so inconsistent with it as to show that it cannot be accepted.

A judgment of a foreign court having jurisdiction over the parties and subject-matter — *i. e.*, having jurisdiction to summon the defend-

ants before it and to decide such matters as it has decided — cannot be impeached in this country on its merits. *Castrique v. Imrie*, L. R. 4 H. L. 414 (*in rem.*); *Godard v. Gray*, L. R. 6 Q. B. 139 (*in personam*); *Messina v. Petrococcchino* (1872), L. R. 4 P. C. 144 (*in personam*). It is quite inconsistent with those cases, and also with *Vanquelin v. Bouard*, *supra*, to hold that such a judgment can be impeached here for a mere error in procedure. And in *Castrique v. Imrie*, *supra*, Lord Colonsay said, L. R. 4 H. L. 448, that no inquiry on such a matter should be made.

A decree for divorce, altering as it does the status of the parties and affecting, as it may do, the legitimacy of their after-born children, is much more like a judgment *in rem* than a judgment *in personam*; see *Niboyet v. Niboyet* (1878), 4 P. D. 1, 12. And where there are differences between the two, the decisions on foreign judgments *in rem* are better guides for the determination of this case than decisions of foreign judgments *in personam*. The leading cases on foreign judgments *in rem* are *Dogliani v. Crispin*, L. R. 1 H. L. 301; *Castrique v. Imrie*, *supra*; *In re Trufort*, 36 Ch. D. 600. There is nothing, however, in the decisions in these cases to assist the defendants. On the contrary, the judgments delivered in them are, in my opinion, adverse to the defendants' contention.

In *Dogliani v. Crispin*, *supra*, a Portuguese court decided that the respondent was the natural son of a deceased man domiciled in Portugal, and not a "noble," and that the respondent was consequently entitled to succeed to his father's personal estate. The appellant was a party to those proceedings, but she afterwards claimed the property in question under a will of the deceased. She was held precluded from disputing the Portuguese decree. Lord Cranworth distinctly stated (L. R. 1 H. L. 315), that the decision, having been pronounced by a court of competent jurisdiction, was one which English courts were "bound to receive without inquiry as to its conformity or non-conformity with the laws of the country where it was pronounced;" and a little lower Lord Cranworth stated that, in his opinion, evidence to show that the decision was not in accordance with Portuguese law ought not to have been received. Lord Cranworth's judgment did not, as I understand it, turn on the fact that the appellant was personally estopped from disputing the Portuguese judgment because she was a party to the proceedings in Portugal; his decision was based on the competence of the court and the nature of the controversy before it. It is necessary, however, to bear in mind that undefended proceedings for divorce require to be very narrowly scrutinized, for such divorces may be easily connived at. It is unnecessary to consider whether an English court would recognize a foreign divorce proved to have been obtained by collusion, even if the parties divorced were foreigners domiciled and resident within the jurisdiction of the foreign court. No collusion is relied upon or proved in the present case. If, therefore, the principles above explained are correct, I see no ground on which

an English court can refuse to recognize the validity of the divorce in question in this case, unless it be on one or other of the two following grounds: namely, (1) that a foreign divorce decree pronounced in an undefended action will never be recognized in this country; or (2) that the courts of this country will not recognize any divorce even of foreigners for any causes other than those for which a divorce can be obtained in this country. To lay down now for the first time either of these doctrines is, in my judgment, quite impossible, nor were they alluded to by counsel. I thought it, however, desirable to mention them, in order that it might not be supposed that they had been overlooked.

In the result the appeal must be allowed and the judgment reversed, and a declaration be made that the plaintiff is entitled to the £200 a year, with an account and order for payment. The defendants must pay the costs of the action and of the appeal.

HILTON v. GUYOT.

SUPREME COURT OF THE UNITED STATES. 1895.

[*Reported 159 United States, 113.*]

THE first of these two cases was an action at law, brought December 18, 1885, in the Circuit Court of the United States for the Southern District of New York, by Gustave Bertin Guyot, as official liquidator of the firm of Charles Fortin & Co., and by the surviving members of that firm, all aliens and citizens of the Republic of France, against Henry Hilton and William Libbey, citizens of the United States and of the State of New York, and trading as copartners, in the cities of New York and Paris and elsewhere, under the firm name of A. T. Stewart & Co. The action was upon a judgment recovered in a French court at Paris in the Republic of France by the firm of Charles Fortin & Co., all whose members were French citizens, against Hilton and Libbey, trading as copartners as aforesaid, and citizens of the United States and of the State of New York.

The answer of the defendants alleged that they appeared in the French court solely for the purpose of protecting their property there; that there were gross frauds in the accounts of Fortin & Co.; that the trial was not a fair one; that by the law of France if such a judgment had been obtained in the United States the merits of it would be re-examined in the French courts.

The defendants, on June 22, 1888, filed a bill in equity against the plaintiffs, setting forth the same matters as in their answer to the action at law, and praying for a discovery, and for an injunction against the prosecution of the action. To that bill a plea was filed, setting up the

French judgments; and upon a hearing the bill was dismissed. 42 Fed. Rep. 249. From the decree dismissing the bill an appeal was taken, which was the second case now before this court.

The action at law afterwards came on for trial by a jury. The court directed a verdict for the plaintiffs in the sum of \$277,775.44, being the amount of the French judgment and interest. The defendants, having duly excepted to the rulings and direction of the court, sued out a writ of error.

The writ of error in the action at law and the appeal in the suit in equity were argued together in this court in January, 1894, and by direction of the court were reargued in April, 1894.¹

GRAY, J.² In order to appreciate the weight of the various authorities cited at the bar, it is important to distinguish different kinds of judgments. Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice. In alluding to different kinds of judgments, therefore, such jurisdiction, proceedings, and notice will be assumed. It will also be assumed that they are untainted by fraud, the effect of which will be considered later.

A judgment *in rem*, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. As said by Chief Justice Marshall: "The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of coördinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coördinate tribunal is capable of making the inquiry." *Williams v. Armroyd*, 7 Cranch, 423, 432. The most common illustrations of this are decrees of courts of admiralty and prize, which proceed upon principles of international law. *Croudson v. Leonard*, 4 Cranch, 434; *Williams v. Armroyd*, above cited; *Ludlow v. Dale*, 1 Johns. Cas. 16. But the same rule applies to judgments *in rem* under municipal law. *Hudson v. Guestier*, 4 Cranch, 293; *Ennis v. Smith*, 14 How. 400, 430; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 291; *Scott v. McNeal*, 154 U. S. 34, 46; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Monroe v. Douglas*, 4 Sandf. Ch. 126.

A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. *Cottingham's case*,

¹ The statement of facts is abridged, and arguments of counsel are omitted. Part of the opinion of the court is omitted. — Ed.

² Part of the opinion is omitted. See the opinion at large for an exhaustive collection of authorities. — Ed.

2 Swans. 326; *Roach v. Garvan*, 1 Ves. Sen. 157; *Harvey v. Farnie*, 8 App. Cas. 43; *Cheely v. Clayton*, 110 U. S. 701. It was of a foreign sentence of divorce, that Lord Chancellor Nottingham, in the House of Lords, in 1688, in *Cottington's case*, above cited, said: "It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences."

Other judgments, not strictly *in rem*, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. For instance a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached. Story on Conflict of Laws (2d ed.), § 592 *a*. And if, on the dissolution of a partnership, one partner promises to indemnify the other against the debts of the partnership, a judgment for such a debt, under which the latter has been compelled to pay it, is conclusive evidence of the debt in a suit by him to recover the amount upon the promise of indemnity. It was of such a judgment, and in such a suit, that Lord Nottingham said: "Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here." *Gold v. Canham* (1689), 2 Swans. 325; s. c. 1 Cas. in Ch. 311. See also *Tarleton v. Tarleton*, 4 M. & S. 20; *Konitzky v. Meyer*, 49 N. Y. 571.

Other foreign judgments which have been held conclusive of the matter adjudged were judgments discharging obligations contracted in the foreign country between citizens or residents thereof. Story's Conflict of Laws, §§ 330-341; *May v. Breed*, 7 Cush. 15. Such was the case, cited at the bar, of *Burroughs or Burrows v. Jamineau or Jemino*, Mos. 1; s. c. 2 Stra. 733; 2 Eq. Cas. Ab. 525, pl. 7; 12 Vin. Ab. 87, pl. 9; Sel. Cas. in Ch. 69; 1 Dick. 48.

In that case, bills of exchange, drawn in London, were negotiated, indorsed, and accepted at Leghorn in Italy, by the law of which an acceptance became void if the drawer failed without leaving effects in the acceptor's hands. The acceptor, accordingly, having received advices that the drawer had failed before the acceptances, brought a suit at Leghorn against the last indorsees, to be discharged of his acceptances, paid the money into court and obtained a sentence there, by which the acceptances were vacated as against those indorsees and all the indorsers and negotiators of the bills, and the money deposited was returned to him. Being afterwards sued at law in England by subsequent holders of the bills, he applied to the Court of Chancery and obtained a perpetual injunction. Lord Chancellor King, as reported by Strange,

"was clearly of opinion that this cause was to be determined according to the local laws of the place where the bill was negotiated, and the plaintiff's acceptance of the bill having been vacated and declared void by a court of competent jurisdiction, he thought that sentence was conclusive and bound the Court of Chancery here;" as reported in Viner, that "the court at Leghorn had jurisdiction of the thing, and of the persons;" and, as reported by Mosely, that, though "the last indorsees had the sole property of the bills, and were therefore made the only parties to the suit at Leghorn, yet the sentence made the acceptance void against the now defendants and all others." It is doubtful, at the least, whether such a sentence was entitled to the effect given to it by Lord Chancellor King. See *Novelli v. Rossi*, 2 B. & Ad. 757; *Castrique v. Imrie*, L. R. 4 H. L. 414, 435; 2 Smith's Lead. Cas. (2d ed.) 450.

The remark of Lord Hardwicke, *arguendo*, as Chief Justice, in *Boucher v. Lawson* (1734), that "the reason gone upon by Lord Chancellor King, in the case of *Burroughs v. Jamineau*, was certainly right, that where any court, whether foreign or domestic, that has the proper jurisdiction of the case, makes a determination, it is conclusive to all other courts," evidently had reference, as the context shows, to judgments of a court having jurisdiction of the thing; and did not touch the effect of an executory judgment for a debt. Cas. temp. Hardw. 85, 89; s. c. *Cunningham*, 144, 148.

In former times, foreign decrees in admiralty *in personam* were executed, even by imprisonment of the defendant, by the Court of Admiralty in England, upon letters rogatory from the foreign sovereign, without a new suit. Its right to do so was recognized by the Court of King's Bench in 1607 in a case of *habeas corpus*, cited by the plaintiffs, and reported as follows: "If a man of Frizeland sues an Englishman in Frizeland before the Governor there, and there recovers against him a certain sum; upon which the Englishman, not having sufficient to satisfy it, comes into England, upon which the Governor sends his letters massive into England, *omnes magistratus infra regnum Anglie rogans*, to make execution of the said judgment. The Judge of the Admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by the common law; for this is by the law of nations, that the justice of one nation should be aiding to the justice of another nation, and for one to execute the judgment of the other; and the law of England takes notice of this law, and the Judge of the Admiralty is the proper magistrate for this purpose; for he only hath the execution of the civil law within the realm. Pasch. 5 Jac. B. R., Weir's case, resolved upon an *habeas corpus*, and remanded." 1 Rol. Ab. 530, pl. 12; 6 Vin. Ab. 512, pl. 12. But the only question there raised or decided was of the power of the English Court of Admiralty, and not of the conclusiveness of the foreign sentence; and in later times the mode of enforcing a foreign decree in admiralty is by a new libel. See *The City of Mecca*, 5 P. D. 28, and 6 P. D. 106.

The extraterritorial effect of judgments *in personam*, at law or in equity, may differ, according to the parties to the cause. A judgment of that kind between two citizens or residents of the country, and thereby subject to the jurisdiction, in which it is rendered, may be held conclusive as between them everywhere. So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either. And if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound. *Ricardo v. Garcias*, 12 Cl. & Fin. 368; *The Griefswald*, Swabey, 430, 435; *Barber v. Lamb*, 8 C. B. (N. S.) 95; *Lea v. Deakin*, 11 Biss. 23.

The effect to which a judgment, purely executory, rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled in an action thereon against the latter in his own country — as is the case now before us — presents a more difficult question, upon which there has been some diversity of opinion.

Early in the last century, it was settled in England that a foreign judgment on a debt was considered not, like a judgment of a domestic court of record, as a record or a specialty, a lawful consideration for which was conclusively presumed; but as a simple contract only. . . .

In recent times, foreign judgments rendered within the dominions of the English Crown, and under the law of England, after a trial on the merits, and no want of jurisdiction, and no fraud or mistake, being shown or offered to be shown, have been treated as conclusive by the highest courts of New York, Maine, and Illinois. *Lazier v. Wescott* (1862), 26 N. Y. 146, 150; *Dunstan v. Higgins* (1893), 138 N. Y. 70, 74; *Rankin v. Goddard* (1866), 54 Me. 28, and (1868) 55 Me. 389; *Baker v. Palmer* (1876), 83 Ill. 568. In two early cases in Ohio, it was said that foreign judgments were conclusive, unless shown to have been obtained by fraud. *Silver Lake Bank v. Harding* (1832), 5 Ohio, 545, 547; *Anderson v. Anderson* (1837), 8 Ohio, 108, 110. But in a later case in that State it was said that they were only *prima facie* evidence of indebtedness. *Pelton v. Platner* (1844), 13 Ohio, 209, 217. In *Jones v. Jamison* (1860), 15 La. Ann. 35, the decision was only that, by virtue of the statutes of Louisiana, a foreign judgment merged the original cause of action as against the plaintiff. . . .

In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or

any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

But they have sought to impeach that judgment upon several other grounds, which require separate consideration.

It is objected that the appearance and litigation of the defendants in the French tribunals were not voluntary, but by legal compulsion, and therefore that the French courts never acquired such jurisdiction over the defendants, that they should be held bound by the judgment.

Upon the question what should be considered such a voluntary appearance, as to amount to a submission to the jurisdiction of a foreign court, there has been some difference of opinion in England. . . .

But it is now settled in England that, while an appearance by the defendant in a court of a foreign country, for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance. *De Cosse Brissac v. Rathbone* (1860), 6 H. & N. 301; s. c. 20 Law Journal (N. S.), Exch. 238; *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 162; *Voinet v. Barrett* (1885), 1 Cab. & El. 554; s. c. 54 Law Journal (N. S.), Q. B. 521, and 55 Law Journal (N. S.), Q. B. 39.

The present case is not one of a person travelling through or casually found in a foreign country. The defendants, although they were not citizens or residents of France, but were citizens and residents of the State of New York, and their principal place of business was in the city of New York, yet had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, although they did not make sales in France. Under such circumstances, evidence that their sole object in appearing and carrying on the litigation in the French courts was to prevent property, in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of those courts, from being taken in satisfaction of any judgment that might be recovered against them, would not, according to our law, show that those courts did not acquire jurisdiction of the persons of the defendants. . . .

It is now established in England by well considered and strongly reasoned decisions of the Court of Appeal, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.¹ . . .

¹ Citing *Abouloff v. Oppenheimer*, 10 Q. B. D. 295; *Vadala v. Lawes*, 25 Q. B. D. 310; *Crozat v. Brogden*, [1894] 2 Q. B. 30. — Ed.

But whether these decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, it is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries. . . .

There is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller States, — Norway, Portugal, Greece, Monaco, and Hayti, — the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being *prima facie* evidence of the justice of the claim. In the great majority of the countries on the continent of Europe, — in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary (perhaps in Italy), and in Spain, — as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.

The prediction of Mr. Justice Story (in section 618 of his Commentaries on the Conflict of Laws, already cited) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.

The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

By our law, at the time of the adoption of the Constitution, a foreign judgment was considered as *prima facie* evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made,

it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the Colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to re-examination, either merely because it was a foreign judgment, or because judgments of that nation would be re-examinable in the courts of France.

For these reasons, in the action at law, the

Judgment is reversed, and the cause remanded to the Circuit Court with directions to set aside the verdict and to order a new trial.

For the same reasons, in the suit in equity between these parties, the foreign judgment is not a bar, and, therefore, the

Decree dismissing the bill is reversed, the plea adjudged bad, and the cause remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

Mr. Chief Justice FULLER, with whom concurred Mr. Justice HARLAN, Mr. Justice BREWER, and Mr. Justice JACKSON, dissenting.

Plaintiffs brought their action on a judgment recovered by them against the defendants in the courts of France, which courts had jurisdiction over person and subject-matter, and in respect of which judgment no fraud was alleged, except in particulars contested in and considered by the French courts. The question is whether under these circumstances, and in the absence of a treaty or act of Congress, the judgment is re-examinable upon the merits. This question I regard as one to be determined by the ordinary and settled rule in respect of allowing a party, who has had an opportunity to prove his case in a competent court, to retry it on the merits, and it seems to me that the doctrine of *res judicata* applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy that there should be an end of litigation.

This application of the doctrine is in accordance with our own jurisprudence, and it is not necessary that we should hold it to be required by some rule of international law. The fundamental principle concerning judgments is that disputes are finally determined by them, and I am unable to perceive why a judgment *in personam* which is not open to question on the ground of want of jurisdiction, either intrin-

sically or over the parties, or of fraud, or on any other recognized ground of impeachment, should not be held *inter partes*, though recovered abroad, conclusive on the merits.

Judgments are executory while unpaid, but in this country execution is not given upon a foreign judgment as such, it being enforced through a new judgment obtained in an action brought for that purpose.

The principle that requires litigation to be treated as terminated by final judgment properly rendered, is as applicable to a judgment proceeded on in such an action, as to any other, and forbids the allowance to the judgment debtor of a retrial of the original cause of action, as of right, in disregard of the obligation to pay arising on the judgment and of the rights acquired by the judgment creditor thereby.

That any other conclusion is inadmissible is forcibly illustrated by the case in hand. Plaintiffs in error were trading copartners in Paris as well as in New York, and had a place of business in Paris at the time of these transactions and of the commencement of the suit against them in France. The subjects of the suit were commercial transactions, having their origin, and partly performed, in France under a contract there made, and alleged to be modified by the dealings of the parties there; and one of the claims against them was for goods sold to them there. They appeared generally in the case, without protest, and by counterclaims relating to the same general course of business, a part of them only connected with the claims against them, became actors in the suit and submitted to the courts their own claims for affirmative relief, as well as the claims against them. The courts were competent, and they took the chances of a decision in their favor. As traders in France they were under the protection of its laws and were bound by its laws, its commercial usages, and its rules of procedure. The fact that they were Americans and the opposite parties were citizens of France is immaterial, and there is no suggestion on the record that those courts proceeded on any other ground than that all litigants, whatever their nationality, were entitled to equal justice therein. If plaintiffs in error had succeeded in their cross suit and recovered judgment against defendants in error, and had sued them here on that judgment, defendants in error would not have been permitted to say that the judgment in France was not conclusive against them. As it was, defendants in error recovered, and I think plaintiffs in error are not entitled to try their fortune anew before the courts of this country on the same matters voluntarily submitted by them to the decision of the foreign tribunal. We are dealing with the judgment of a court of a civilized country, whose laws and system of justice recognize the general rules in respect to property and rights between man and man prevailing among all civilized peoples. Obviously the last persons who should be heard to complain are those who identified themselves with the business of that country, knowing that all their transactions there would be subject to the local laws and modes of doing business. The French courts appear to have acted "judicially, honestly, and

with the intention to arrive at the right conclusion ;" and a result thus reached ought not to be disturbed.

[The learned Chief Justice here recited extracts from the opinions in *Nouvion v. Freeman*, 15 App. Cas. 1, and *Godard v. Gray*, L. R. 6 Q. B. 139, and continued:]

In any aspect, it is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights acquired under foreign laws. Now the rule is universal in this country that private rights acquired under the laws of foreign States will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the State where this is sought to be done ; and although the source of this rule may have been the comity characterizing the intercourse between nations, it prevails to-day by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right.

And, without going into the refinements of the publicists on the subject, it appears to me that that law finds authoritative expression in the judgments of courts of competent jurisdiction over parties and subject-matter.

It is held by the majority of the court that defendants cannot be permitted to contest the validity and effect of this judgment on the general ground that it was erroneous in law or in fact ; and the special grounds relied on are *seriatim* rejected. In respect of the last of these, that of fraud, it is said that it is unnecessary in this case to decide whether certain decisions cited in regard to impeaching foreign judgments for fraud could be followed consistently with our own decisions as to impeaching domestic judgments for that reason, "because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France, and that ground is the want of reciprocity on the part of France as to the effect to be given to the judgments of this and other foreign countries." And the conclusion is announced to be "that judgments rendered in France or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim." In other words, that although no special ground exists for impeaching the original justice of a judgment, such as want of jurisdiction or fraud, the right to retry the merits of the original cause at large, defendant being put upon proving those merits, should be accorded in every suit on judgments recovered in countries where our own judgments are not given full effect, on that ground merely.

I cannot yield my assent to the proposition that because by legislation and judicial decision in France that effect is not there given to judgments recovered in this country which, according to our jurisprudence, we think should be given to judgments wherever recovered,

(subject, of course, to the recognized exceptions,) therefore we should pursue the same line of conduct as respects the judgments of French tribunals. The application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary.

As the court expressly abstains from deciding whether the judgment is impeachable on the ground of fraud, I refrain from any observations on that branch of the case.

Mr. Justice HARLAN, Mr. Justice BREWER, and Mr. Justice JACKSON concur in this dissent.

SADLER v. ROBINS.

NISI PRIUS, AND COURT OF KING'S BENCH. 1808.

[*Reported 1 Campbell, 253.*]

ASSUMPSIT on a decree of the high Court of Chancery in the island of Jamaica. The declaration stated, that on the 16th day of July, 1805, in a certain cause, wherein James Sadler and others were complainants, and James Robins and others, executors of John Sadler deceased, were defendants, it was by the said high Court of Chancery ordered, adjudged, and decreed, that the said James Robins and one R. Haywood, since deceased, should on or before the first day of January then next ensuing pay unto the said James Sadler, or his lawful attorney or attorneys in the said island, the sum of £3,670 1s. 9¼d. current money of the said Island, with interest thereon from the 31st day of December then last past, first deducting thereout the full costs of the said defendants expended in the said suit, the same to be taxed by George Howell, Esq., one of the masters of the said court; and also deducting thereout all and every further payment or payments which the said James Sadler and R. Haywood or either of them might, on or before the said 1st day of January, 1806, show to the satisfaction of the said George Howell that they or either of them had paid on account of their said testator's estate. The declaration having then stated a liability and promise in the words of the decree, and the amount of the sum to be paid in sterling money with interest, went on to aver that the said James Robins and R. Haywood did not nor did either of them on or before the 1st day of January, 1806, or at any subsequent time, cause the costs by the said defendants in the said cause in the said Court of Chancery expended in that suit to be taxed by the said George Howell, Esq., or by any other of the masters of the said Court of Chancery, but as well the said James Robins, and R. Haywood, in the lifetime of the said R. Haywood, as the said James Robins since the death of the said R. Haywood, have altogether neglected and refused

so to do, nor did the said James Robins, and R. Haywood, in the lifetime of the said R. Haywood, on or before the said first day of January, 1806, show to the satisfaction of the said George Howell, or any other master of the said court, that they or either of them had paid on account of the said testator's estate any sum or sums of money whatsoever: Breach, for non-payment of the said sum of £3,670 1s. 9½d. current money, with interest due thereon, as mentioned in the decree. Plea, *the general issue*.

The Attorney General having opened the plaintiff's case,

Lord ELLENBOROUGH expressed himself of opinion that the action was not maintainable; as it did not appear what sum was actually due to the plaintiff according to the terms of the decree.

The Attorney General contended that it lay upon the defendant to reduce the sum below that awarded to be paid on the first of January, 1806, and that if he took no steps for this purpose, the whole sum of £3,670 1s. 9½d. currency, became absolutely due on that day. It was impossible for the plaintiff either to tax the costs of the defendants in the suit, or to show what sums of money any of them has paid for their testator; and it was plain, from the words of the decree, that before any deduction was to be made by the plaintiff, the acts of taxing costs and proving payments were to be done by the opposite party.

Lord ELLENBOROUGH. "Deducting thereout the full costs of the said defendants" is the same as "the full costs of the said defendants first being deducted thereout;" and if the defendants did not appear to tax their costs, the plaintiff might have proceeded *ex parte*. At present, the sum due on the decree is quite indefinite. The operations to ascertain it should have taken place in the Court of Chancery in Jamaica, and cannot be gone through here at *nisi prius*. Had the decree been perfected, I would have given effect to it, as well as to a judgment at common law. The one may be the consideration for an assumpsit equally with the other.¹ But the law implies a promise to pay a definite, not an indefinite sum.

The Attorney General then urged strenuously, that the objection was upon the record, and that if it was well founded, judgment might be arrested.

Lord ELLENBOROUGH. If there is evidently no consideration to raise a promise, so that the action cannot be supported, why should the defendant be put to move in arrest of judgment? The plaintiff ought not to have brought his action here, while the decree was in an incomplete state. The case we had at the sittings after last term, *Buchanan v. Rucker*, 1 Camp. 63, shows with what facility these decrees and judgments in the West India islands are obtained; and they ought to be examined with some strictness before they are put in force in this country. In many other cases, when it is clear the action will not lie; although the objection appears on the record, and might be taken

¹ *Acc. Henderson v. Henderson*, 6 Q. B. 288; *Pennington v. Gibson*, 16 How. 65; *Meyer v. Brooks*, 29 Or. 203. — ED.

advantage of by motion in arrest of judgment, or by writ of error, judges are in the habit of directing a nonsuit.

The plaintiff was then called.

The Attorney General in the following term obtained a rule to show cause why this nonsuit should not be set aside; but cause being shown, the judges were unanimously of opinion that it ought to stand.

LORD ELLENBOROUGH. There appears to be due to the plaintiff upon the decree a sum of money — *x*. Till the sum to be deducted is ascertained, it is impossible to say how much is really due. The plaintiff ought to have taxed the costs *ex parte*. There is no court where this proceeding is not allowed. At present no one can predicate how much the defendant is decreed to pay. The decree is therefore imperfect and cannot be the foundation of an assumpsit. As to the payments on account of the testator's estate, none being proved, it might be presumed that there were none; but there had certainly been costs expended in the suit, and until they are deducted according to the terms of the decree, an action cannot be maintained upon it.

GROSE, J. The plaintiff shows what sum is not due to him, not what sum is due.

LE BLANC, J. It is clear that the plaintiff is not entitled to the whole sum mentioned in the decree; and it was competent to him to have had the costs taxed at something however small.

BAYLEY, J. Of the same opinion.

*Rule discharged.*¹

CHRISTMAS v. RUSSELL.

SUPREME COURT OF THE UNITED STATES. 1867.

[*Reported 5 Wallace, 290.*]

CLIFFORD, J. Wilson, on the eleventh day of November, 1857, recovered judgment in one of the county courts in the State of Kentucky, against the plaintiff in error, for the sum of five thousand six hundred and thirty-four dollars and thirteen cents, which, on the thirty-first day of March, 1859, was affirmed in the Court of Appeals. Present record shows that the action in that case was assumpsit, and that it was founded upon a certain promissory note, signed by the defendant in that suit, and dated at Vicksburg, in the State of Mississippi, on the tenth day of March, 1840, and that it was payable at the Merchants' Bank, in New Orleans, and was duly indorsed to the plaintiff by the payee. Process was duly served upon the defendant, and he appeared in the case and pleaded to the declaration. Several defences were set up, but they were all finally overruled, and the verdict and judgment were for the plaintiff.

¹ *Acc. Whitaker v. Bramson, 2 Paine, 209. So of an alternative judgment for a return or the payment of money. Thorner v. Batory, 41 Md. 593. — ED.*

On the fourth day of June, 1854, the prevailing party in that suit instituted the present suit in the court below, which was an action of debt on that judgment, as appears by the transcript. Defendant was duly served with process, and appeared and filed six pleas in answer to the action. Reference, however, need only be particularly made to the second and fourth, as they embody the material questions presented for decision. Substance and effect of the second plea were that the note, at the commencement of the suit in Kentucky, was barred by the statute of limitations of Mississippi, the defendant having been a domiciled citizen of that State when the cause of action accrued, and from that time to the commencement of the suit.

Fourth plea alleges that the judgment mentioned in the declaration was procured by the fraud of the plaintiff in that suit. Plaintiff demurred to these pleas, as well as to the fifth and sixth, and the court sustained the demurrers.¹ . . .

4. Cases may be found in which it is held that the judgment of a State court, when introduced as evidence in the tribunals of another State, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another State are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They certainly are not foreign judgments under the Constitution and laws of Congress in any proper sense, because they "shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the State from whence" they were taken, nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the State where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments. *D'Arcy v. Ketchum et al.*, 11 How. 165; *Webster v. Reid*, 11 How. 437.

Subject to those qualifications, the judgment of a State court is conclusive in the courts of all the other States wherever the same matter is brought in controversy. Established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment. *Voorhees v. United States Bank*, 10 Pet. 449; *Huff v. Hutchingson*, 14 How. 588.

5. Exactly the same point was decided in the case of *Benton v. Burgot* (10 *Sergeant & Rawle*, 240) which, in all respects, was substantially like the present case. The action was debt on judgment

¹ Only so much of the opinion as discusses the demurrer to the fourth plea is given.
-- Ed.

recovered in a court of another State, and the defendant appeared and pleaded *nil debet*, and that the judgment was obtained by fraud, imposition, and mistake, and without consideration. Plaintiff demurred to those pleas, and the court of original jurisdiction gave judgment for the defendant. Whereupon the plaintiff brought error, and the Supreme Court of the State, after full argument, reversed the judgment and directed judgment for the plaintiff. Domestic judgments, say the Supreme Court of Maine, even if fraudulently obtained, must nevertheless be considered as conclusive until reversed or set aside. *Granger v. Clark*, 22 Me. 130. Settled rule, also, in the Supreme Court of Ohio, is that the judgment of another State, rendered in a case in which the court had jurisdiction, has all the force in that State of a domestic judgment, and that the plea of fraud is not available as an answer to an action on the judgment. Express decision of the court is, that such a judgment can only be impeached by a direct proceeding in chancery. *Anderson v. Anderson*, 8 Ohio, 108.

Similar decisions have been made in the Supreme Court of Massachusetts, and it is there held that a party to a judgment cannot be permitted in equity, any more than at law, collaterally to impeach it on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered. *B. & W. Railroad v. Sparhawk*, 1 Allen, 448; *Homer v. Fish*, 1 Pick. 435. Whole current of decisions upon the subject in that State seems to recognize the principle that when a cause of action has been instituted in a proper forum, where all matters of defence were open to the party sued, the judgment is conclusive until reversed by a superior court having jurisdiction of the cause, or until the same is set aside by a direct proceeding in chancery. *McRae v. Mattoon*, 13 Pick. 57. State judgments, in courts of competent jurisdiction, are also held by the Supreme Court of Vermont to be conclusive as between the parties until the same are reversed or in some manner set aside and annulled. Strangers, say the court, may show that they were collusive or fraudulent; but they bind parties and privies. *Atkinsons v. Allen*, 12 Vt. 624.

Redfield, Ch. J., said in the case of *Hammond v. Wilder*, 23 Vt. 346, that there was no case in which the judgment of a court of record of general jurisdiction had been held void, unless for a defect of jurisdiction. Less uniformity exists in the reported decisions upon the subject in the courts of New York, but all those of recent date are to the same effect. Take, for example, the case of *Embury v. Conner*, 3 Coms. 522, and it is clear that the same doctrine is acknowledged and enforced. Indeed the court, in effect, say that the rule is undeniable that the judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. *Dobson v. Pearce*, 2 Kern. 165. Same rule prevails in the courts of New Hampshire,

Rhode Island, and Connecticut, and in most of the other States. *Hol-
lister v. Abbott*, 11 Fost. 448; *Rathbone v. Terry*, 1 R. I. 77; *Topp
v. The Bank*, 2 Swan, 188; *Wall v. Wall*, 28 Miss. 413.

For these reasons our conclusion is, that the fourth plea of the de-
fendant is bad upon general demurrer, and that there is no error in
the record. The judgment of the Circuit Court is therefore,

*Affirmed with costs.*¹

ABERCROMBIE v. ABERCROMBIE.

SUPREME COURT OF KANSAS. 1902.

[Reported 67 *Pacific Reporter*, 539.]

GREENE, J.² The plaintiff and defendant were wife and husband. They separated, and the plaintiff took up her residence in El Paso County, Colo., where she brought suit for divorce, alimony, custody of their children, and attorney's fees. . . . The Colorado court had no jurisdiction of the defendant, unless it obtained such jurisdiction by reason of the defendant having filed in said court the stipulation to take depositions, together with the depositions so taken. On the 10th day of July the cause was called for trial. The court upon the application of plaintiff, appointed one R. L. Kennedy to appear for the defendant. Mr. Kennedy duly appeared in pursuance of such appointment. A trial was had, and judgment rendered for the plaintiff, granting her a decree of divorce, the care and custody of all the children, \$200 annually for each of said children until each arrived at the age of 21 years, \$2,000 for the support and maintenance of plaintiff, \$200 attorney's fees, and for costs of action. Plaintiff brought suit on a transcript of that judgment against the defendant in the District Court of Mitchell County,

¹ *Acc.* *Hanley v. Donoghue*, 116 U. S. 1, 4 (*semble*); *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841; *Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484; *McDonald v. Drew*, 64 N. H. 547, 15 Atl. 148; but see *Embry v. Palmer*, 107 U. S. 7, 11.

It is generally agreed that a plea that the judgment of another State of the Union was obtained by fraud does not state a good *legal* defence. *Peel v. January*, 35 Ark. 331; *Anderson v. Anderson*, 8 Oh. 108; *Wyoming Mfg. Co. v. Mohler*, (Pa.) 17 Atl. 31. *Contra*, *Warrington v. Ball*, 90 Fed. 465; *Coffee v. Neely*, 2 Heisk. 304.

But it is usually held that a bill will lie to enjoin an action upon a judgment fraudulently obtained in another State (at least where, as is usually the case, such a bill would lie in each State in case of a domestic judgment obtained by fraud). *Pearce v. Olney*, 20 Conn. 544; *Engel v. Scheuerman* 40 Ga. 206; *Dobson v. Pearce*, 12 N. Y. 156; *Babcock v. Marshall*, (Tex. Civ. App.) 50 S. W. 728; *Brown v. Parker*, 28 Wis. 21. And where an equitable plea may be set up in an action at law, it is usually held that an equitable plea that the judgment was obtained by fraud is a good bar to an action on the judgment of another State. *Rogers v. Gwinn*, 21 Ia. 58; *Ward v. Quinlin*, 57 Mo. 425; *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, 60 N. E. 663. And in a proceeding in equity the judgment may be impeached for fraud. *Davis v. Headley*, 22 N. J. Eq. 115. — ED.

² Part of the opinion is omitted. — ED.

Kan. The defendant answered, setting up — First, that the judgment rendered against him by the court in Colorado was without jurisdiction; and, second, that his appearance therein, if it should be held that the stipulation to take depositions was an appearance, was obtained by fraud and misrepresentations on the part of plaintiff. Upon the trial, judgment was rendered for the defendant below, and the plaintiff prosecuted error to this court. . . .

The defendant appeared in the Colorado court for the purpose of litigating and having determined one of the questions involved in that lawsuit. There is no conflict in the authorities that, where one appears in a case for any purpose other than to object to the jurisdiction of the court, he submits himself to that jurisdiction for all purposes of the action. The conduct, however, of the plaintiff in inducing and procuring the defendant to enter his appearance in said court is most reprehensible. The defendant entered into the agreement of settlement in good faith, and, as made, it was within the authority given by the plaintiff. He performed his agreement under the stipulation, so far as it was possible, up to the time the plaintiff repudiated it. When he entered into this stipulation it was understood that there was no unsettled question for determination by the Colorado court, except the custody of the boys. She induced him to believe this, and for this purpose, and no other, he was willing to submit himself to the jurisdiction of that court. When this stipulation had been secured and filed in that court, and after she had received a part of the consideration of the agreement, she repudiated the agreement, and then fraudulently uses this agreement to obtain a judgment for alimony. We have no hesitancy in saying that the defendant was induced by fraud and misrepresentations to enter such appearance in the Colorado court. It was as much fraud as if she had telegraphed or written him that one of their children was dangerously ill, for the purpose of inducing him to come to the State that she might secure service of summons upon him. Courts will not sanction such conduct, nor aid one in securing the fruits of an advantage thus fraudulently obtained. . . .

The jurisdiction of the Colorado court over the defendant having been obtained fraudulently by the plaintiff, it would be an anomaly in the law for this court to assist her in reaping the fruits of her fraudulent conduct. It has long been a rule of this court that where jurisdiction of a defendant has been obtained by fraud or wrong he may appear in the action, showing such fraud, and the court will always grant relief. If this is true, can there be any well-defined distinction between permitting him to appear in the original action to show the fraud, and in allowing him to set up such fraud in an action brought upon a judgment rendered in a case where jurisdiction of the defendant was obtained by fraud? Can a valid lawful act be accomplished by an unlawful means? . . .

The fact that the judgment sued on in this case is the judgment of a sister State can make no difference. It is only when jurisdiction is

admitted that full faith and credit should be given to the judgments of a sister State. That the judgment of a sister State may be attacked collaterally on the ground that jurisdiction was obtained fraudulently is supported by many authorities. In *Wood v. Wood*, 78 Ky. 624, 627, — an action upon a judgment in another State, where jurisdiction had been obtained fraudulently, — the court said: “The judgment, having been rendered by an inferior court, presumably without general jurisdiction, will be treated as a foreign judgment. . . . But whether it be treated as a foreign judgment or as a judgment of a court of general jurisdiction rendered in a sister State, and therefore coming within the constitutional provision and the act of Congress in regard to the faith and credit to be given such judgments, is immaterial, as it is now held both by the State and federal courts that judgments of either character may be collaterally attacked for want of jurisdiction of the subject-matter or of the person, regardless of recitals in the judgment or record. *Whart. Conf. Laws*, § 811; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Thompson v. Whitman*, 18 Wall. 457; and *Knowles v. Coke Co.*, 19 Wall. 59. It is now perfectly well settled that the judgment of a court without jurisdiction of both the subject-matter and of the person is absolutely void. It is, in legal effect, no judgment. No rights can be acquired under it, and no rights divested by it. Whenever such a judgment is relied upon for any purpose or in any way, the fact of the existence of jurisdiction may be inquired into. The only serious question that has arisen of late years upon this matter is as to whether the judgment could be collaterally inquired into, as to the jurisdiction of the person, when it recites on its face that there was service of process or personal appearance. But now even that question is practically at rest.” In *Dunlap v. Cody*, 31 Ia. 261, 262, 7 Am. Rep. 129, the chief justice says: “Do the means used to obtain jurisdiction of the person of defendant in the courts of Illinois amount to fraud? It would seem that this question scarcely needs discussion. Fraud consists in *suggestio falsi* or the *suppressio veri*. Both exist here. . . . An enlightened and just administration of the law, no less than sound public morals, condemns such practices, and demands that the client whose cupidity could sanction . . . such a purpose should . . . be disgraced. Does the fact that the jurisdiction of the person of the defendant was obtained by fraud constitute a defence to an action upon this judgment? It is the recognized law of this State that, when jurisdiction is properly acquired, fraud in the obtaining of a foreign judgment is a good defence to an action thereon. *Rogers v. Gwinn*, 21 Ia. 59, and cases cited. If, then, fraud may be shown to defeat a recovery upon a foreign judgment when the jurisdiction is undisputed, why should not fraud in obtaining the jurisdiction be followed by like consequences? . . . *Ex parte Wilson*, 1 Atk. 152. Referring to these authorities, *Shaw, C. J.*, says: ‘These cases, therefore, seem to establish the general principle that a valid and lawful act cannot be accomplished by

any unlawful means, and whenever such unlawful means are resorted to the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights.' ” In *Duringer v. Moschino*, 93 Ind. 495, subdivision 1 of the syllabus reads: “ Where, by fraud, one induces another to go to another State in order to have service of process upon him, the latter can safely ignore the proceedings, and successfully resist a suit upon any judgment thus obtained.”

It follows, therefore, that the judgment of the court below is correct, and must be affirmed. All the justices concurring.

BURNLEY v. STEVENSON.

SUPREME COURT OF OHIO. 1873.

[*Reported 24 Ohio State, 474.*]

MOTION for leave to file a petition in error to reverse the judgment of the District Court of Pickaway County.

The original action was brought in the Court of Common Pleas of Pickaway County, by the plaintiffs in error, to recover from the defendant in error the possession of two undivided third parts of 606 acres of land, situate in said county, and being part of original survey No. 6943, in the Virginia military district. The plaintiffs sought to recover in the right of the heirs of Gen. Charles Scott, to whom the land embraced in this survey had been conveyed by the United States by patent, in the year 1812.

The defendant, by way of defence, set up in his answer the following state of facts, to wit: That previous to the date of said patent, Gen. Charles Scott, having received a warrant for 1,666 $\frac{2}{3}$ acres of land, for military services rendered by him in the Virginia line in the continental establishment, had employed one John Evans, a surveyor, to locate, survey, and obtain patents for him, on said warrant, on lands in the Virginia military district, and in consideration of the services of Evans in the premises, had agreed to convey to him one-fifth part of all the lands so to be located, surveyed, and patented; that Evans duly performed said services; that the lands embraced in survey 6,943, were part of the lands located, surveyed and patented to Gen. Scott under said warrant; that it was further agreed between Scott and Evans, that the share of Evans under the contract should be selected from lands in said survey; that soon after the issuing of the patents to Scott, he died, without having conveyed to Evans the lands to which he was entitled under said contract.

That afterward Evans filed his bill in chancery, in the Circuit Court of Fayette County, Kentucky (the same being a court of general equity jurisdiction), against the heirs and legal representatives of said Scott

being the same persons under whom the plaintiffs claim title), to compel the specific performance of said contract, by a conveyance to him of the lands to which he was entitled thereunder; that said court obtained jurisdiction of the persons of all said heirs, by service of process and by voluntary appearance; that upon the final hearing of said cause upon the bill, answers, and exhibits, to wit on the 2d day of February, 1816, the court found the equity of the case in favor of Evans, and directed the defendants therein to convey to him the lands described in the petition of the plaintiffs below; that it was further decreed by said court, that in default of such conveyance by the defendants, one Robert Scott, a master commissioner of said court, should make such conveyance; and that afterward, in pursuance of said decree, said master commissioner, to wit, on the 28th of May, 1817, executed and delivered to said Evans a deed in fee-simple for said lands.

The defendant in his answer further sets forth, that he has succeeded to all the rights and title of said John Evans in and to said lands, and avers that he and those under whom he claims are now lawfully in possession thereof, and have so been in possession, claiming under said decree and the deed from said master, ever since the dates thereof.

To this defence the plaintiffs below filed their reply, to which the defendant demurred. The demurrer was sustained, to which ruling the plaintiffs excepted.

Judgment was therefore rendered in favor of the defendant below, which was afterward, on error, affirmed by the District Court.

To reverse these judgments, this proceeding is now instituted.

Plaintiffs in error admit that their reply in the court below was insufficient, if the above matters and things contained in the answer constituted a good defence to the action.¹

MCLVAINE, J. The main proposition submitted in this case is whether, under and by virtue of the decree of the Circuit Court of Kentucky and the master's deed made in pursuance thereof, or of either of them, such an estate or right was vested in John Evans, as entitles the defendant, who has succeeded to all the rights of Evans, to the possession of the lands in controversy, as against the plaintiffs, whose claim of title is derived from the parties against whom the decree was rendered.

1. The jurisdiction of the Circuit Court to pronounce the decree, is the first inquiry involved in this proposition.

It appears from the record before us, that the Circuit Court of Kentucky which pronounced the decree, was a court of general equity jurisdiction; that some of the defendants in the cause were properly served with the process of the court, and that all others voluntarily appeared and submitted themselves to its jurisdiction, and that the subject-matter of the bill on which the decree was rendered, was the enforcement of a trust and the specific performance of a contract to convey lands situate in the State of Ohio.

¹ Arguments of counsel are omitted. — Ed.

That courts exercising chancery powers in one State have jurisdiction to enforce a trust, and to compel the specific performance of a contract in relation to lands situate in another State, after having obtained jurisdiction of the persons of those upon whom the obligation rests, is a doctrine fully settled by numerous decisions. *Penn v. Lord Baltimore*, 1 Ves. 444; *Massie v. Watts*, 6 Cranch, 148; *Penn v. Hayward*, 14 Ohio St. 302, and cases therein cited.

2. It does not follow, however, that a court having power to compel the parties before it to convey lands situated in another State, may make its own decree to operate as such conveyance. Indeed, it is well settled that the decree of such court cannot operate to transfer title to lands situate in a foreign jurisdiction. And this, for the reason that a judgment or decree *in rem* cannot operate beyond the limits of the jurisdiction or State wherein it is rendered. And if a decree in such case cannot effect the transfer of the title to such lands, it is clear that a deed executed by a master, under the direction of the court, can have no greater effect. *Watts v. Waddle et al.*, 6 Pet. 389; *Page v. McKee*, 3 W. P. D. Bush, 135. The master's deed to Evans must therefore be regarded as a nullity.

The next inquiry then is as to the force and effect of the decree rendered by the Circuit Court directing the heirs of Gen. Scott to convey the land in Ohio to Evans. This decree was *in personam*, and bound the consciences of those against whom it was rendered. In it, the contract of their ancestor to make the conveyance was merged. The fact that the title which had descended to them was held by them in trust for Evans was thus established by the decree of a court of competent jurisdiction. Such decree is record evidence of that fact, and also of the fact that it became and was their duty to convey the legal title to him. The performance of that duty might have been enforced against them in that court by attachment as for contempt; and the fact that the conveyance was not made in pursuance of the order, does not affect the validity of the decree in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment, the parties, and those holding under them with notice, are still bound thereby.

3. Under our code of practice, equitable as well as legal defences may be set up in an action for the recovery of land. The defendant in the court below set up this decree of the Circuit Court of Kentucky as a defence to the plaintiffs' action. That it did not constitute a good defence at law may be admitted, but we think, in equity, it was a sufficient defence.

The constitution of the United States declares that full faith and credit shall be given in each State to the records and judicial proceedings of every other State, and provides that Congress may prescribe the mode of proving such records and proceedings, and the effect thereof. By an act of May 26, 1790, Congress declared that the "records and judicial proceedings of the State courts," when properly

authenticated, "shall have the same faith and credit given to them in every court within the United States, as they have, by law or usage, in the courts of the State from whence they are or shall be taken." When, therefore, a decree rendered by a court in a sister State, having jurisdiction of the parties and of the subject-matter, is offered as evidence, or pleaded as the foundation of a right, in any action in the courts of this State, it is entitled to the same force and effect which it had in the State where it was pronounced. *Mills v. Duryea*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234; *McGilvray & Co. v. Avery*, 30 Vt. 538. That this decree had the effect in Kentucky of determining the equities of the parties to the land in this State, we have already shown; hence the courts of this State must accord to it the same effect. True, the courts of this State cannot enforce the performance of that decree by compelling the conveyance through its process of attachment; but when pleaded in our courts as a cause of action, or as a ground of defence, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud. See cases *supra*; also, *Davis v. Headley*, 22 N. J. Eq. 115; *Brown v. L. & D. R. R. Co.*, 2 Beas. (N. J. Eq.) 191; *Dobson v. Pearce*, 2 Kern. 156; *U. S. Bank v. Bank of Baltimore*, 7 Gill, 415. *Motion overruled.*

BULLOCK v. BULLOCK.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1894.

[Reported 52 New Jersey Equity, 561.]

MAGIE, J.¹ The appellant in this cause was the complainant below. Her bill of complaint stated the following facts, viz., that she had commenced an action in the Supreme Court of the State of New York, which court had "jurisdiction in the case," against respondent, her former husband, for the purpose of dissolving the marriage previously entered into by them; that respondent was personally served with process and duly appeared in said action; that such proceedings were had thereon that a judgment was rendered in her favor, whereby it was adjudged that said marriage should be dissolved; that respondent should pay to her, as alimony, \$100 on the first day of each month, commencing June 1, 1892, and should execute a mortgage as security for such payments, upon lands in the State of New Jersey, of such form and containing such provisions as the court should subsequently direct and approve; that said court, by a subsequent order, directed respondent to execute, acknowledge, and deliver to appellant a mortgage of a specified form and containing specified provisions, upon lands in this

¹ Part of this opinion and part of the dissenting opinion, in which is discussed the jurisdiction of the New York court, are omitted. — Ed.

State which were particularly described in the order; that respondent had failed and refused to execute and deliver the mortgage as directed, and made various mortgages and conveyances of said lands without consideration and with the fraudulent purpose of defeating appellant's rights.

It was charged in the bill that appellant, by virtue of the decree and order of the New York court, acquired an equitable lien on said lands prior to the lien and interest of the mortgagees and grantees of respondent, and an equitable right to a mortgage on said lands in accordance with the decree and order.

Upon these statements and charges the prayers of the bill were for answer and discovery, for a decree setting aside the mortgages and conveyances of respondent, and that he be "decreed, pursuant to the said decree and order of the New York Supreme Court, to execute and deliver" to her "the mortgage on said premises therein directed to be made and delivered, according to the form therein provided." There was a general prayer for relief.

Respondent moved the Court of Chancery to dismiss the bill pursuant to the practice established by rule 215 of that court, upon the ground that the bill exhibited no equity entitling appellant to the relief she prayed for. The notice of the motion specifically set forth the grounds of objection.

The motion was heard by Vice-Chancellor Bird, and upon his advice a decree was made dismissing the bill. The opinion of the vice-chancellor is reported in 6 Dick. Ch. Rep. 444. From this decree appellant has prosecuted the appeal which is now to be decided. . . .

In my judgment it does not admit of doubt that the jurisdiction of the Supreme Court of New York, if properly averred in the bill, was a jurisdiction to make a decree as to alimony and its being secured by mortgage on lands in New Jersey only *in personam*, and to enforce it by any process against respondent which is proper in that State. Nor was the decree which was pronounced by that court capable of any other construction than one which shows it to have been within such conceded jurisdiction.

From these considerations I deem it evident that the theory of this bill that, by virtue of the decree and order of the Supreme Court of New York, appellant acquired an equitable lien on lands in New Jersey and a right to have such lands disposed in a certain manner, cannot be sustained without a disastrous violation of fundamental principles. The decree and order of that court does not pretend to have any such purpose or effect, nor could that court be empowered to make a decree having such an effect.

But it is ingeniously contended in this court that the decree and order of the Supreme Court of New York imposed upon respondent a personal obligation to do what that decree and order had directed him to do, and that a court of equity in New Jersey ought to compel him to perform that obligation as it would compel him to perform his con-

tract to convey or mortgage lands in its jurisdiction. Moreover, it is contended that the provisions of section 1 of article 4 of the Constitution of the United States, requiring full faith and credit to be given in each State to the records and judicial proceedings of every other State impart to this decree and order a conclusive force with respect to the mortgage directed to be given on lands here, which compels our courts to enforce it by degrees in conformity therewith.

Doubtless the judgment of the New York court must be accorded in our courts a conclusive effect in certain respects. Thus it has conclusively determined the status of the parties to that action, and that the marital relation previously existing between them has been absolutely dissolved. If, by the direction to pay alimony an indebtedness arises from time to time as such payments become due, an action at law would lie thereon, and the decree would furnish conclusive evidence of such indebtedness.

But the question, upon the solution of which this case must turn, is whether the courts of New Jersey must give conclusive effect to the decree or judgment of the courts of New York made in a case where they had acquired jurisdiction of the parties but affecting lands situated here, and disposing of the title thereto in whole or in part. If this question is to be answered in the affirmative, it seems evident that we accord jurisdiction over lands in New Jersey to the courts of other States, and, as was said by Chancellor Zabriskie, in *Davis v. Headley*, 22 N. J. Eq. 115, "leave to the courts of this State only the ministerial duty of executing their decrees." For the doctrine that jurisdiction respecting lands in a foreign State is not *in rem* but only *in personam* is heretofore of all practical force if the decree *in personam* is conclusive and must be enforced by the courts of the situs.

If such is the effect which must be given to the judgments and decrees of the courts of a sister State respecting lands situated here, it is extraordinary that no trace of the doctrine can be found in text-books or in adjudicated decisions. My researches have not disclosed any support of the doctrine by any text-writer of repute or by any decision in point. The very industrious counsel who maintained this view in argument has produced no authority which, in my judgment, sustains his position. . . .

The contention that such an order requiring lands in New Jersey to be charged with alimony created a personal obligation on respondent is, in my judgment, without force. It is a misuse of terms to call the burden thereby imposed on respondent a personal obligation. At the most, the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process or to make our decrees operate as process. Moreover, the substantial part of the decree is comprised in the dissolution of the marriage and the direction to pay alimony. The charge of the alimony upon lands is rather in the nature of process to enforce the substantial decretal order for alimony.

The establishment of the contrary doctrine would result in practically depriving a State of that exclusive control over immovable property therein which has always been accorded. For example, by our statutes, contracts respecting lands, to be enforceable, must be entered into and evidenced in a particular mode, but our courts, upon equitable grounds, sometimes enforce contracts that are without the statute. It is the province of our legislature to prescribe the rule for such contracts and for our courts to construe the rule so prescribed and to determine when such contracts, whether within or without the statute, may be enforced. It is true that the courts of another State, proceeding *in personam* to enforce a contract for lands in New Jersey, would be bound to determine whether the contract was enforceable under our laws. But they would construe those laws, and if their decree *in personam* may and must be conclusive in our courts and compel a decree in conformity therewith, it is obvious that the contract will be enforced according to whatever construction the foreign court put upon our laws, and not according to the construction of our own courts. Other example will occur to any one considering the subject.

For these reasons I shall vote to affirm the decree below.

GARRISON, J. (concurring).

I concur in the result announced by Mr. Justice MAGIE, but not for the reasons contained in the opinion just read, nor for those stated in the conclusions of the learned equity judge who heard the cause in the Court of Chancery.

The object of the complainant's bill is to execute, through the medium of our Court of Chancery, an order made by the Supreme Court of New York upon the defendant to secure his performance of a decree rendered therein against him by mortgaging his lands in New Jersey. The procedure in this State is justified under that provision of the federal law that gives conclusive force in one State to the records and judicial proceedings of another. The vice of this deduction, in the case before us, is that it assumes that the order made by the New York court to secure the performance by the defendant of its decree against him is a "*judgment*" of that State within the meaning of the federal Constitution and the act of Congress.

The transcendent force given by the federal law to the judicial proceedings of sister States is confined to such judicial determinations as possess the quality of *judgment*; it does not extend to proceedings in the nature of execution or to orders merely ancillary to some special form of relief.

In cases that proceed to judgment in common-law form, this distinction is well marked, but it is liable to be lost sight of in decisions rendered in equity causes where judgment, in decretal form, is often accompanied by special orders for particular forms of relief or for the enforcement or securing of the execution of the decree pronounced. The distinction, however, is always a substantial one that

must not be overlooked because of the form in which the decretal order may be framed.

That only is *judgment* that is pronounced between the parties to the action upon the matters submitted to the court for decision. To judgments thus rendered, the federal law accords in every State the same conclusive force possessed in the State where they are rendered. After judgment in a State court, all that follows for the purpose of enabling the successful party to reap the benefits of the determination in his favor is execution or in aid of execution. No interpretation has ever been placed upon the federal Constitution giving conclusive effect, or, indeed, any effect at all to the executions of the judgments rendered in sister States or to any order merely in aid thereof. Such orders lack the quality of *judgment* and must be differentiated from judgments, even though embodied in the same decretal orders that pronounce the judgment of the court. These decretal orders may be defined to be decisions made touching some matter collateral to the issue presented in the record or required to be passed upon in order to carry into execution the judgment of the court. To these determinations ancillary to execution, no extraterritorial force is given by the federal law.

That the order in the present case touching the defendant's land in New Jersey is of this nature clearly appears in the case before us. Upon this demurrer it is established that the New York suit was instituted for the sole purpose of dissolving the marriage of the complainant with the defendant. Upon the record thus submitted the Supreme Court of New York pronounced as its judgment that the marriage should be dissolved with the incident of alimony to the complainant. Here the sentence of the law upon the record ceases. The order of the court then proceeds in these words: "And it is further adjudged and decreed that the said defendant, within ten days after the entry of this judgment and service thereof on the attorney for the defendant, execute and deliver unto the plaintiff a mortgage covering the real property owned by the defendant and particularly located in the State of New Jersey, which mortgage shall be of such form and contain such provisions as shall be sufficient and requisite to secure unto the plaintiff the faithful performance of the provisions of this judgment and decree on the part of the defendant as may be directed and approved by this court."

In my opinion this order was ancillary to execution and did not possess any element of a judgment upon the issue submitted to the court for decision, which was whether the marriage between the parties should be dissolved. For this reason I think the complainant's bill was properly dismissed.

VAN SYCKEL, J. (dissenting).

The Supreme Court of New York made a decree for divorce in favor of the wife, and ordered that the husband pay \$100 per month alimony, and that to secure it to the wife he should execute a mortgage on lands

which he owned in New Jersey. Personal service was made upon the husband in the New York divorce suit, and the decree for divorce, including the order to execute the mortgage, was obtained on the 1st day of July, 1892.

On the 19th of November, 1892, on the application of the wife's attorney, an order was entered in the New York court specifying the lands in New Jersey upon which the husband should execute the mortgage.

Thereupon the wife filed a bill in the Court of Chancery of this State to compel the husband to execute the mortgage in accordance with the New York judgment, and also to set aside conveyances of the property in this State by the husband, which are alleged to be fraudulent. . . .

It is undoubtedly true that the New York court had no power to create a lien upon New Jersey lands, and it is also true that the New York court could have acted upon the person of the husband while within its jurisdiction and constrained him to execute such a writing as would have been effective to pass the title to, or establish a lien on, the New Jersey lands. The question, however, is not what the New York court could have done, but what the courts of New Jersey, in discharge of her constitutional obligations, should do in aid of the wife after rendition of the judgment in New York.

The New York court having jurisdiction of the person of the husband and also of the subject-matter of the suit there, the judgment in that State, as between the parties to that suit, was conclusive of the right of the wife to have the husband execute a mortgage upon the New Jersey lands, although it did not of its own force create a lien upon the lands. As to the title to such lands, it had the effect of an admitted legal contract or obligation by the husband to convey and should be enforced in equity here.

A judgment in New York that a party defendant shall specifically perform a written contract to convey lands in New Jersey would furnish no better foundation for the interference of our court of equity than the judgment relied upon in this case. In what respect they differ in principle is not apparent. In either case obedience to the mandate of the federal Constitution would give effect to the judgment here.

In *Elizabeth Savings Institution v. Gerber*, 8 Stew. Eq. 153, this court held that a judicial order in New York that the garnishee owes a debt to the defendant in a judgment, such moneys being in the custody of a court of equity, creates *per se* a right to apply to such court for such moneys in the same way as an assignment of such moneys to the plaintiff in the judgment would have passed such right. Such a decree in the New York court settled the plaintiff's right to the fund, and that right was an equitable one, which was enforced in this State.

The decree or judgment in New York has the effect of being not merely *prima facie* evidence, but conclusive proof of the rights thereby

adjudicated, and a refusal to give it the force and effect in this respect which it had in the State in which it was rendered denies a right secured by fundamental law.

The force and effect of the decree for alimony in New York was not to create a lien upon lands in New Jersey, but to conclusively entitle the wife to have that decree enforced against the husband.

It being competent for our courts to enforce such a decree made in our own courts by establishing it as a lien on lands, we cannot refuse like relief in this case on the extraterritorial judgment. *Huntington v. Attrill*, 146 U. S. 657; *McElmoyle v. Cohen*, 13 Pet. 312.

In *Cheever v. Wilson*, 9 Wall. 108, 121, there was an order of the divorce court in Indiana directing the wife to pay one-third of her rents as they became due to her husband. The land was in Washington, where suit was brought to enforce payment of the rents to the husband. The court said that the decree in Indiana, so far as it related to the real property in question, could have no extraterritorial effect; but if valid, it bound these who were parties in the case, and could have been enforced in the *situs rei* by proper proceedings for that purpose.

The judgment in New York must be regarded as conclusively imposing a legal personal obligation or duty upon the husband to mortgage his lands in New Jersey.

The New York judgment is conclusive between the parties to it—

First. As to the right to a divorce.

Second. As to the right of the wife to the alimony allowed.

Third. It is equally conclusive, as against the husband, as to her right to have such alimony secured by a mortgage on his New Jersey lands, that being expressly a part of the adjudication in New York.

The judgment imposed an obligation upon the husband from which he cannot relieve himself by removing from the jurisdiction in which it was rendered; that obligation follows him into this State.

The lien does not by mere force of the extraterritorial judgment attach to lands in this State. To impress that lien upon lands here the intervention of our court of equity is necessary, just as it is necessary to sue here upon a New York judgment before execution can issue from our courts to obtain satisfaction of it.

The husband has had his day in court in New York, where all these questions have been adjudicated against him, and our courts should hold that he is thereby concluded.

The question in its true form is whether we will give full faith and credit to the judgment of the New York court in so far as it finally adjudges the questions legally submitted to it, when it had jurisdiction both of the subject-matter of the controversy and of the parties to it.

It seems to me that there can be but one answer to this question, and that the court below erred in dismissing the complainant's bill.¹

¹ Execution will not be issued on the judgment of another State of the Union without suit upon the judgment. *McElmoyle v. Cohen*, 13 Pet. 312; *Turley v. Dreyfus*, 35 La. Ann. 510; *Lamberton v. Grant*, 94 Me. 508, 48 Atl. 127. — Ed.

BULLOCK *v.* BULLOCK.

SUPREME COURT OF NEW JERSEY. 1895.

[*Reported 57 New Jersey Law*, 508.]

VAN SYCKEL, J. The declaration in this case is founded upon a decree of the Supreme Court of New York, directing the payment of alimony by the defendant to the plaintiff at \$100 per month. The declaration alleges that there is due upon said decree the sum of \$1,600, and that the defendant promised to pay the amount so due.

The declaration further avers that the Supreme Court of New York is a court of general jurisdiction, and that it had jurisdiction over the parties and the subject-matter of the suit, the said defendant having been duly served with process, and having appeared and answered the bill of complaint in that court.

To this declaration the defendant filed a general demurrer.

In *Van Buskirk v. Mulock*, 18 N. J. L. 184, Chief Justice Hornblower held that, at the common law, an action of debt will not lie on a decree of a court of equity for the payment of money.

In the recent case of *Mutual Fire Insurance Co. v. Newton*, 50 N. J. L. 571, this court discussed that question, taking the contrary view and citing a number of cases in support of it.

In *Evans v. Tatum*, 9 Serg. & R. 252, Chief Justice Tilghman gave a foreign decree in equity the conclusive force of a judgment between the parties to a suit on it in Pennsylvania.

The same rule prevails in the courts of Massachusetts and New York. *Howard v. Howard*, 15 Mass. 196; *Rigney v. Rigney*, 127 N. Y. 408.

The question as to the conclusive effect of the decree is no longer an open one in this State. In the recent case of *Bullock v. Bullock*, 52 N. J. Eq. 561, the Court of Errors and Appeals, while refusing to establish a decree for alimony made in New York as a lien upon lands in New Jersey, declared "that the decree in New York conclusively determined the status of the parties to that action, and that the marital relation previously existing between them had been absolutely dissolved.

"If, by the direction to pay alimony an indebtedness arises from time to time, as such payments become due, an action at law will lie thereon, and the decree will furnish conclusive evidence of such indebtedness."

The allegations in the declaration show a sufficient legal basis for the plaintiff's action, and the demurrer should be overruled, with costs.¹

¹ *Acc.* *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761; *Rogers v. Rogers*, 15 B. Mon. 364; *Allen v. Allen*, 100 Mass. 373; *Wood v. Wood*, 7 N. Y. Misc. 579; *Arrington v. Arrington*, 127 N. C. 190, 37 S. E. 212; *Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 391. — ED.

LYNDE v. LYNDE.

SUPREME COURT OF THE UNITED STATES. 1901.

[Reported 181 *United States*, 183.]ERROR to the Supreme Court of the State of New York.¹

GRAY, J. — By the Constitution and the act of Congress, requiring the faith and credit to be given to a judgment of the court of another State that it has in the State where it was rendered, it was long ago declared by this court: "The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit." *McElmoyle v. Cohen*, 13 Pet. 312, 325; *Thompson v. Whitman*, 18 Wall. 457, 463; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 292; *Bullock v. Bullock*, 6 Dickinson (51 N. J. Eq.) 444, and 7 Dickinson (52 N. J. Eq.) 561.

The decree of the Court of Chancery of New Jersey, on which this suit is brought, provides, first, for the payment of \$7,840 for alimony already due, and \$1,000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of \$80 per week; and third, for the giving of a bond to secure the payment of these sums, and, on default of payment or of giving bond, for leave to apply for a writ of sequestration, or a receiver and injunction.

The decree for the payment of \$8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver, and injunction, being in the nature of execution and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended on the local statutes and practice of the State, and involved no Federal question.

On the writ of error of the wife, therefore,

The judgment is affirmed.

¹ Statement of facts and part of the opinion of the court, involving another question, are omitted. — Ed.

HOLKER v. PARKER.

COURT OF CASSATION, FRANCE. 1819.

[Reported 21 *Bulletin des Arrêts*, 119.]

By a judgment of May 14, 1814, the Tribunal of Boston condemned Parker, an American, to pay Holker, a Frenchman, a sum of nearly three millions in settlement of a commercial partnership. Parker lived in France, and had there acquired both movable and immovable property, on which Holker prayed the Civil Tribunal of the Seine to authorize the execution of the judgment of the Tribunal of Boston.

The Tribunal of the Seine did in fact declare the Boston judgment executory. This decree was made without examination or knowledge of the merits, and upon an appeal by Parker the Royal Court of Paris reversed the judgment for the following reasons:¹—

THE COURT. Judgments rendered by foreign courts have neither effect nor authority in France; this rule is doubtless more particularly applicable in favor of Frenchmen, to whom the king and his officers owe a special protection, but the principle is absolute, and may be invoked by all persons, without distinction, being founded on the independence of States. The ordinance of 1629, in the beginning of its article 121, lays down the principle in its generality when it says that judgments rendered in foreign kingdoms and sovereignties, for any cause whatever, shall have no execution in the kingdom of France, and the Civil Code, art. 2123, gives to this principle the same latitude when it declares that a lien cannot result from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal (which is not a matter of mere form, like the granting in past times of a *pareatis* from one department to another for judgments rendered within the kingdom, but which assumes, on the part of the French tribunals, a cognizance of the cause, and a full examination of the justice of the judgment presented for execution, as reason demands, and that this has always been practised in France, according to the testimony of our ancient authorities). There may result from this an inconvenience, where the debtor, as is asserted to have happened in the present case, removes his property and his person to France, while keeping his domicile in his native country; it is for the creditor to be watchful, but no consideration can impair a principle on which rests the sovereignty of governments, and which, whatever be the case, must preserve its whole force.

Holker appealed; but the appeal was dismissed by the Court of Cassation for the following reasons:—

¹ The decree of the Royal Court is Mr. Justice Gray's translation of the decree as given in Merlin's *Questions de Droit*, Jugement, § 14, No. 2, and is found in his opinion in *Hilton v. Guyot*, 159 U. S. 113, 215.—Ed.

THE COURT. The ordinance of 1629 enacted, in absolute terms and without exception, that foreign judgments should not have execution in France; it was only by the Civil Code and the Code of Civil Procedure that the French tribunals have been authorized to declare them executory; the ordinance of 1629, therefore, had no application. The articles of the Codes referred to did not authorize the courts to declare judgments rendered in a foreign country executory in France without examination; such an authorization would be as contrary to the institution of the courts as would be the award of the refusal of execution arbitrarily and at will, would impeach the right of sovereignty of the French government, and was not in the intention of the legislature, which, while it has permitted the execution of judgments of arbitrators clothed by law with the judicial character upon a simple *pareatis* has been careful to confide the power of granting an order of *exequatur* to the presiding judge, and not to the tribunal, because a tribunal can pronounce judgment only after deliberation, and even upon default should grant prayers addressed to it only after they have been found just and true (Articles 116 and 150 of the Code of Procedure).

The Civil Code and the Code of Procedure make no distinction between judgments pronounced in a foreign country, permitting the judges to declare them all executory.

Therefore, judgments being without doubt subject to examination by the provisions of the Civil Code when pronounced against Frenchmen, it is necessary to hold that all others should be rendered executory only after examination of the merits; unless we were to add to the law, and introduce into it an arbitrary distinction unfounded in reason or authority.

It follows that in rejecting the exception of *chose jugée* which was claimed to result from a judgment pronounced in a foreign country, and in ordering the plaintiff to produce the evidence upon which his action is based, to be answered by Parker and to be passed upon by the court after full investigation, the Royal Court of Paris made a just application of Articles 2123 and 2128 of the Civil Code and 546 of the Code of Procedure. For these reasons,

Appeal dismissed.

TILKIN-MENTION v. BYRNE.

COURT OF LIÉGE. 1875.

[Reported 3 *Clunet*, 298.]

BYRNE, having obtained a judgment from the Tribunal of Luxembourg, sued Tilkín in the Tribunal of Commerce of Liége, his domicil, to have the judgment declared executory. Incompetence having been set up in defence, the plaintiff abandoned his claim for an *exequatur*

and declared upon the original claim. The defendant objected that since he had voluntarily chosen a foreign court he can no longer sue in a Belgian court, which has power no longer to do anything but grant an *exequatur* for the foreign judgment.

THE COURT. No text of the law and no principle of public policy forbids a foreigner who has gained a suit against a Belgian in a foreign country to sue him again on the same claim before a Belgian court. It is to be remarked that the demand for an *exequatur* puts the *chose jugée* entirely in question; and it is impossible to see why, if the question may be raised in that way it could not also be raised by bringing the whole question before a court which has jurisdiction of the subject-matter. To hold otherwise would be to give a foreign judgment in Belgium more force than it can have without the grant of an *exequatur*.

ECONOMO v. MESCIADIS.

COURT OF APPEAL OF ALEXANDRIA. 1877.

[Reported 3 *Recueil Officiel*, 34.]

THE COURT. By the terms of Article 468 of the Code of Civil Procedure judgments pronounced abroad by a foreign court are executory in Egypt on the simple order of the President of the Tribunal, but on condition of reciprocity; and it is proper therefore to see whether this reciprocity exists in Greece, since the question is as to process of execution on the judgment of one of her local courts.

By the terms of Article 859 of the Hellenic Code of Civil Procedure foreign judgments are made executory in Greece by the simple order of the President of a Tribunal when all parties are foreigners; but it is not so when one of the parties is Greek. In that case, according to the provisions of the same article, foreign judgments can be executed in Greece only upon order of a Tribunal of First Instance, and after an examination of the merits. By the terms of the next article these Tribunals may refuse execution if they find that the foreign judgment is opposed to the facts or is contrary to public policy.

These provisions affect not merely procedure, but the substantive law as well, since it follows that judgments pronounced abroad between foreigners and Greeks are not executory in Greece of strict right, and that the Hellenic Tribunals may examine the merits, determine whether they are contrary to the true facts, discuss them, reopen the arguments, and definitively modify them or even consider them null. There does not exist, therefore, between Greece and Egypt absolute reciprocity, and we must consider what is the consequence of this difference between the two systems of law, whose provisions have not been modified by any diplomatic treaty.

It is not possible to admit that Article 468 of the Egyptian Code of

Civil Procedure deprives foreign judgments of any execution in Egypt whenever the most complete reciprocity does not exist. Such an interpretation would cause trouble in international business and relations. In requiring reciprocity the Egyptian legislator has merely intended to grant in Egypt no greater force and value to foreign judgments than the State which pronounced them grants to judgments of the Egyptian courts; and the law must obviously be so interpreted. It follows that in the present case of a Greek judgment between a Greek and an Ottoman subject the President of the Tribunal can order an execution only after having first sent the parties before the Tribunal of First Instance to determine whether the judgment of the Tribunal of Syra contains any provision contrary to the facts proved or to public policy. In this way would be preserved both the rules of reciprocity which serve as the basis of Article 468 and also the provision of the same article that the order for execution shall proceed from the President.

It is no objection to this method of procedure that it is not formally prescribed by Article 468, since by the terms of Article 11 of the Civil Code, repeated in Article 34 of the Rules for the organization of the courts, the judge, in the case of silence, insufficiency, or obscurity of the statute, shall supply the lack in conformity with the principles of natural law and the rules of equity. Placed by the insufficiency of the text in the necessity of refusing any execution in Egypt to the judgment of the Tribunal of Syra, or of having recourse to a procedure analogous to that of Greece to supply the omissions of Article 468, the judge should not hesitate to adopt the latter course.

The President so well understood the inconvenience and danger of refusing any execution that he held himself competent, by virtue of the principle of reciprocity, to modify one of the provisions of the judgment of Syra, which he considered contrary to the public policy of Egypt; and he ordered execution only of the remainder of the judgment. But in so acting without sending the case to the Tribunal he has violated rules of reciprocity which he intended to follow. His order should therefore be modified by sending the parties before the Tribunal of First Instance, that the President may make such order, in accordance with its decision, as shall seem fit.¹

¹ Cited and followed in *Geisser v. Wives of Ismail Pacha*, 11 Rec. Off. 14. "It is not permitted to the Court of Appeal to go into an examination of the question on the merits. In this particular, we should presume that the foreign magistrates have conscientiously fulfilled their duty of granting justice to whom it was due." Court of Cassation of Naples, in *Feraud v. Dreyfus*, 1 *Annali della Giur. Ital.* I. 120 (1866). *Acc.*, Court of Cassation of Florence, *Sanna v. Dubosc*, 2 *Annali*, I., 35 (1867).

"International relations admit the principle of reciprocity as one which rests upon the right of equality of treatment and in fact opens the way for the exercise of the right of retortion." Court of Cassation of Turin, in *Levi v. Pitre*, 8 *Annali*, I., 380 (1874). — Ed.

W. v. J.

REICHSGERICHT. 1882.

[Reported 7 Entscheidungen des Reichsgerichts, Civilsachen, 406.¹]

THE defendant is a shipowner residing in the Grand-duchy of Oldenburg. One of his vessels was shipwrecked in the Thames, and in consequence vessel and cargo were sold in London for account of those concerned. The total proceeds were paid to the defendant's agents in London, W. & G. The plaintiffs, I. & Co. in London, had a claim of £119 14s. 1d. payable out of the proceeds, as part owners of the cargo. Not being able to recover this amount from W. & G., who had in the meantime become insolvent, they sued the defendant in a London court. The defendant accepted service without disputing the jurisdiction of the court in question; the Court of First Instance found for the plaintiff, and the defendant's appeal was dismissed. The judgment having become valid, the plaintiffs sued defendant in the provisional court at Oldenburg, asking the court to declare the plaintiff's right to execution by issuing a writ of execution (Code of Procedure, § 660).

The defendant contested the plaintiff's claim on the basis of section 661 [Sec. 2, Nos. 3 and 5], asserting that the jurisdiction of the English courts in the action in question was not justified according to German law, and that reciprocity in England was not guaranteed. The provisional court issued the writ of execution as asked for by the plaintiff. The defendant's appeal was dismissed, the Court of Second Instance deciding that the jurisdiction of the English courts, required by section 661 [Sec. 2, No. 3], although not existing originally, was justified by a tacit understanding according to sections 38, 39, Code of Procedure, and that reciprocity must be considered as guaranteed according to the established practice of the English courts. With regard to the latter point, the Court of Appeal rested its decision on the assumption, that a guarantee of reciprocity is not only found in treaties or statutes, but that it exists already, when, as a matter of fact, the judgments of German courts are executed in a foreign country, without further examination of the legality of such judgments. The court was further of opinion, that the only point to be decided in a particular case was, whether the execution of a German judgment of the same kind could be considered as guaranteed in the foreign State in question, and the court held that in the present case this question must be answered in the affirmative, because the points raised by the defendant against the judgment, of which the execution was demanded, were according to his statement only the following:—

(1) That the judgment had been obtained by an incorrect representation of the facts; (2) that he had a counter-claim against

¹ The translation is that found in Piggott, *Foreign Judgments*, 2d ed., 470.—ED.

plaintiff; points of this kind, however, could not have been raised in an English court, when the execution of a foreign judgment was in question.

The defendant appealed to the Reichsgericht and was successful, the plaintiff's claim being dismissed for the following reasons: —

THE COURT. The recognition of the jurisdiction of the English courts, as based on tacit understanding, cannot be legally objected to.

The defendant, in his contention before us, has confined himself to maintaining that the supposition of the Court of Appeal that reciprocity is guaranteed in England is erroneous in point of law. He has supported his contention by asserting (1) that the habitual practice of foreign courts, as a matter of fact, could not be considered as a guarantee of reciprocity; (2) that according to the rules adopted by the practice of the English courts a further examination of the legality of foreign judgments (of which execution is demanded) is allowed contrary to the requirements of reciprocity.

The rules which English courts apply with regard to the execution of foreign judgments form, according to the English legal conception, a part of the common law, that is of the *lex non scripta*, which only exists in the mind of the judges (*in gremio magistratum*), and which rule on the principle that legal practice (*jurisprudenz*) is binding as law in the same manner as law created by statute.

If the security for reciprocity required by the expression "being guaranteed" may be found, according to the intention of the Code of Procedure, as appears from the minutes of the Committee of Justice, p. 334, section 440, and as other imperial statutes determine (German Criminal Code, §§ 102, 103, 187), not only in international treaties, but also in the existence of corresponding laws enacted by the foreign State, the expression "law" must include here, as well as in section 12 of the act introducing the Code of Civil Procedure, every legal norm (*Rechtsnorm*), and it can therefore make no difference whether the laws in question belong to the written or the unwritten law of the foreign State. As a matter of course, however, there can be no question of a guarantee by law, unless the existence of the laws in question be beyond doubt. The guarantee of reciprocity might therefore be affirmed with regard to England, if it could be safely assumed that a principle of law exhausting the requirements of reciprocity exists, and is universally recognized by the English courts.

According to section 661 [Sec. 1] of the Code of Procedure, the writ of execution is to be issued without an examination of the legality of the decision. The German courts, therefore, are bound to the unqualified recognition of the legal validity (*Rechtskraft*) of the judgments of foreign courts (which are to be enforced by them) after they have become valid by the law of the State in which they have been obtained. It is therefore an essential requirement of reciprocity that the law of the foreign State should recognize in an equal degree the legal validity of the judgments of German courts (which

are to be enforced by its courts), and that an examination of their legality, both as regards the material justice of the decision as to matters of fact or law, and with respect to matters of procedure, should neither be required as a condition of their execution by the court, *ex officio*, nor be allowed by the admission of pleas which might lead to it. The question remains, whether beyond this there is a further general requirement of reciprocity according to which it is necessary that the law of the foreign State imposes no conditions on the admissibility of the execution of foreign judgments beyond those contained in section 661 [Sec. 2, §§ 2, 3, 4] (these requirements would be that the act to be enforced is enforceable according to the law of the country, that the courts of the foreign State are competent according to the law of the country, that in the case of a judgment against a contumacious German, service has been effected in the prescribed manner), or whether, as the Court of Appeal has decided, the question of reciprocity is only to be decided with regard to the converse case and that uniformity may be said to exist when there is a guarantee that a judgment of the same kind would be enforced in the foreign country; but this question need not be decided with reference to the case before us.

The Court of Appeal has, however, based its decision on the further assumption, that with regard to the question whether the execution of a German judgment of the same kind is guaranteed in England, it is sufficient to ascertain whether the English law admits objections of the same kind as the present defendant thinks he can raise against the English judgment (according to his statement), which objections, as a matter of fact, are directed only against the material justice of the decision. This assumption is erroneous in law because, after what has been said, the point to be established, with reference to the question of reciprocity (even if it be confined to judgments of the same kind), is, whether according to the English law it is in any case possible to impugn the legality of the decision, and because reciprocity may also be considered endangered by the admissibility of pleas of a different kind. That this assumption is bad in law may also be concluded from the fact that, according to section 661 [Sec. 1], the defendant's objection against the legality of the judgment which is to be enforced cannot be considered in Germany, and that therefore he cannot be bound to declare himself as to the objections which he might be able to raise, if any objections were admissible, in consequence of which the German judge — as a mere matter of procedure — is already disabled from being guided by the position of the foreign law with regard to these particular objections.

The judgment in question must therefore be annulled, and with regard to the matter itself, the decision must be altered as to the question of reciprocity.¹ . . .

It appears from all these facts, that even in the present state of English legal practice, it is possible to contest the legality of the

¹ The court here examined the condition of the English law upon the subject. — Ed.

judgments of German courts, of which execution is demanded in an English court, that this can be done by pleas, the admissibility of which is partly undisputed, partly dependent on the settlement of controversies which are still in existence, that especially the competence of a German court (supposing it had arrived at a decision under the same circumstances as the English court in the case before us) could not be considered established beyond doubt in England; and that further (which fact has a generally binding significance) the pleas in question include some which, according to their legal intention, could be urged against any foreign judgment (viz. those alleging apparent error and fraud), and the success of which can in a good many cases only depend on an extensive measure of judicial discretion. In such a state of the law the guarantee of reciprocity required by section 661 cannot be found.¹

DREYFUS v. THE CINQUE-SORELLE.

COURT OF CASSATION, FRANCE. 1882.

[*Reported 9 Clunet*, 530.]

THE COURT. When a Frenchman voluntarily submits to a foreign court his disputes with a foreigner, a judicial contract between the parties is formed which prevents the Frenchman, as well as the foreigner, from suing again in a French court on the claim which has been litigated abroad by his free consent.

It appears from the judgment in question that Dreyfus et Cie. sued in an Italian court for damages for delay in lading the vessel which was substituted for the Cinque-Sorelle; this act, which implies on their part the exercise of a personal free choice, in the absence of any complaint, protest, or reservation to the contrary on their part, will not permit them to litigate their claim anew before the French courts. Under these circumstances the court below has violated no law in refusing to entertain the suit.

Appeal rejected.

APPEAL OF X.

TRIBUNAL OF THE SEINE. 1886.

[*Reported 13 Clunet*, 712.]

MADAME X., French by birth, married at Paris, before the French officer of civil status, a foreigner who was subsequently naturalized as

¹ But see a decision of Reichsoberhandelsgericht (21 Entsch. 14) to the effect that, as a general rule, sufficient reciprocity exists in the practice of the United States. — ED.

a Swiss citizen of the Canton of Geneva. A final judgment in a contested suit in the Tribunal of Geneva decreed a divorce between the parties. Madame X. claiming to have become French again by the dissolution of her marriage, desired to have the judgment of divorce recorded in the margin of the act of marriage at the City Hall of Paris, where the marriage was celebrated. The mayor deemed himself unable to make this record until the judgment of divorce had been made executory in France. Madame X demanded an *exequatur* in this court.

THE TRIBUNAL. By a contradictory judgment dated May 14, 1886, the Civil Tribunal of the Republic and Canton of Geneva pronounced in favor of Madame X a decree of divorce from her husband X. The documents introduced show that this is a final judgment. Madame X demands that this judgment be rendered executory in France. But the status of a foreigner in France being ruled by his statute personal, it follows that the decisions of the courts of his country, which alone are competent to fix or modify this status, are applicable as a matter of right in France, like the law in virtue of which they have been rendered. Besides, the judgment in question, having regard to its tenor, is not of a nature to give rise to acts of execution in the sense of Article 546 of the Code of Civil Procedure. There is, therefore, no room for a grant of *exequatur*.

The *exequatur* is therefore refused, with costs to be paid by Madame X.

LANDESBRANDCASSE v. ASSURANCES BELGES.

CIVIL TRIBUNAL OF BRUSSELS. 1893.

[Reported 21 *Clunet*, 164.]

THE TRIBUNAL. The plaintiff demands an *exequatur* for two judgments pronounced by the Tribunal of Kiel and a decree of the court of Kiel between the parties, on October 24, 1888, and May 1 and December 6, 1889. It is not disputed that the judgments in question satisfy the requirements of Article 10 of the law of March 25, 1876.

It was stipulated in a verbal agreement, the terms of which are undisputed, that all disputes arising out of the contract should be judged and determined by the ordinary Tribunal of Kiel, to the judgment of which the "Assurances Belges" company submitted without objection. The question to be decided is, whether by the aforesaid agreement the parties desired and were able to take away from the Belgian judge the right of revision to which foreign judgments are submitted by the law of March 25, 1876.

The right of revision is an emanation of the right of sovereignty;

it proceeds from the *imperium* and is therefore a matter of public concern. It follows clearly from this principle that if the legislature does not grant executory force to foreign judgments when there exists no treaty based on reciprocity, it is not competent for the parties to substitute their will for that of the legislature, arrogating to themselves the power of delegating to the foreign judge a portion of the sovereignty. One cannot liken an agreement conferring competence on a regular foreign judge to an agreement for arbitration; though the judge, it is true, bases his competence upon the agreement, yet he obtains his quality as judge from the authority of his sovereign. Besides, even supposing that parties could by a special agreement attribute executory force to a foreign judgment, still one must decide whether they intended to oust the Belgian judge from the right and duty of revision. If one considers the purpose of the aforesaid agreement, one sees that nothing else was intended except to confer jurisdiction upon a foreign judge for settling the differences which might arise out of the contract between the parties; there was no intention of imposing upon the Belgian judge rules to follow in respect to the execution of decisions that might be rendered in future suits. In this case it is not a question of settling a difference of this sort, for which, by choice of the parties, the foreign judge alone is competent, it is a question, upon this application for *exequatur*, of determining whether decisions which have been rendered are executory in Belgium. If in fact such a determination involves an investigation of the merits, this investigation is not the object of the suit, and is not contrary to the agreement of the parties. They have evidently not contemplated, in submitting their differences to a foreign judge, the regulation of the powers of a judge to whom application for an *exequatur* is made, for they were aware that they could not by contract alter the provisions of the law in such a case.

If the argument of the plaintiff were admitted this extraordinary and impossible conclusion would follow; that no foreign judgment pronounced after a contest could ever be revised. For it would necessarily be true that the party against whom judgment had been given had allowed himself to be judged by a foreign judge; and thereby the Belgian judge, even in the absence of a treaty of reciprocity, would be deprived of the right and duty which the law itself confers upon him.

SECTION III.

THE JUDGMENT AS RES JUDICATA.

CROUDSON v. LEONARD.

SUPREME COURT OF THE UNITED STATES. 1808.

[Reported 4 Cranch, 434.]

JOHNSON, J. The action below was instituted on a policy of insurance.

On behalf of the insurers, it was contended that the policy was forfeited by committing a breach of blockade. It is not, and cannot be made a question, that this is one of those acts which will exonerate the underwriters from their liability. The only point below was relative to the evidence upon which the commission of the act may be substantiated. A sentence of a British prize court in Barbadoes was given in evidence, by which it appeared that the vessel was condemned for attempting to commit a breach of blockade. It is the English doctrine and the correct doctrine on the law of nations, that an attempt to commit a breach of blockade is a violation of belligerent rights, and authorizes capture. This doctrine is not denied, but the plaintiff contends that he did not commit such an attempt, and the court below permitted evidence to go to the jury to disprove the fact on which the condemnation professes to proceed.

On this point, I am of opinion that the court below erred.

I do not think it necessary to go through the mass of learning on this subject, which has so often been brought to the notice of this court, and particularly in the case of *Fitzsimmons*, argued at this term. Nearly the whole of it will be found very well summed up in the 18th chapter of Mr. Park's *Treatise*. The doctrine appears to me to rest upon three very obvious considerations: the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction — the very great inconvenience amounting nearly to an impossibility of fully investigating such cases in a court of common law — and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world.

It is sometimes contended that this doctrine is novel, and that it takes its origin in an incorrect extension of the principle in *Hughes v. Cornelius*. I am induced to believe that it is coeval with the species of contract to which it is applied. Policies of insurance are known to have been brought into England from a country that acknowledged the civil law. This must have been the law of policies at the time when

they were considered as contracts proper for the admiralty jurisdiction, and were submitted to the court of policies established in the reign of Elizabeth. It is probable that, at the time when the common law assumed to itself exclusive jurisdiction of the contract of insurance, the rule was too much blended with the law of policies to have been dispensed with, had it even been inconsistent with common law principles. But, in fact, the common law had sufficient precedent for this rule, in its own received principles relative to sentences of the civil law courts of England. It may be true that there are no cases upon this subject prior to that of *Hughes v. Cornelius*, but this does not disprove the existence of the doctrine. There can be little necessity for reporting decisions upon questions that cannot be controverted. Since the case of *Hughes v. Cornelius*, the doctrine has frequently been brought to the notice of the courts of Great Britain in insurance cases, but always with a view to contest its applicability to particular cases, or to restrict the general doctrine by exceptions, but the existence of the rule or its applicability to actions on policies is nowhere controverted.

I am of opinion that the sentence of condemnation was conclusive evidence of the commission of the offence for which the vessel was condemned, and as that offence was one which vitiated the policy, the defendants ought to have had a verdict.

WASHINGTON, J. The single question in this case is, whether the sentence of the admiralty court at Barbadoes, condemning the brig "Fame" and her cargo as prize, for an attempt to break the blockade of Martinique, is conclusive evidence against the insured, to falsify his warranty of neutrality, notwithstanding the fact stated in the sentence as the ground of condemnation is negatived by the jury?

This question has long been at rest in England. The established law upon this subject in the courts of that country is, that the sentence of a foreign court of competent jurisdiction condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact so decided, that it can never be controverted, directly or collaterally, in any other court having concurrent jurisdiction.

This doctrine seems to result from the application of a legal principle which prevails in respect to domestic judgments, to the judgments and sentences of foreign courts.

It is a well established rule in England, that the judgment, sentence, or decree of a court of exclusive jurisdiction directly upon the point, may be given in evidence as conclusive between the same parties, upon the same matter coming incidentally in question in another court for a different purpose. It is not only conclusive of the right which it establishes, but of the fact which it directly decides.

This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering, upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem*, but any person having an

interest in the property may interpose a claim, or may prosecute an appeal from the sentence. The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned, so that, in this respect, he also represents the insurer. That irregularities have sometimes taken place, to the exclusion of a fair hearing of the parties, is not to be denied. But this furnishes no good reason against the adoption of a general rule. A spirit of comity has induced the courts of England to presume that foreign tribunals, whether of prize or municipal jurisdiction, will act fairly, and will decide according to the laws which ought to govern them; and public convenience seems to require that a question which has once been fairly decided should not again be litigated between the same parties, unless in a court of appellate jurisdiction.

The irregular and unjust decisions of the French courts of admiralty of late years have induced even English judges to doubt of the wisdom of the above doctrine in relation to foreign sentences, but which they have acknowledged to be too well established for English tribunals to shake; and the justice with which the same charge is made by all neutral nations against the English as well as against the French courts of admiralty, during the same period, has led many American jurists to question the validity of the doctrine in the courts of our own country. It is said to be a novel doctrine, lately sprung up, and acted upon as a rule of decision in the English courts, since the period when English decisions have lost the weight of authority in the courts of the United States. It is this position which I shall now examine, acknowledging that I do not hold myself bound by such decisions made since the revolution, although, as evidence of what the law was prior to that period, I read and respect them.

The authority of the case of *Hughes v. Cornelius*, the earliest we meet with as to the conclusiveness of a foreign sentence, is admitted; but its application to a question arising under a warranty of neutrality between the insurer and insured is denied. It is true that, in that case, the only point expressly decided was, that the sentence was conclusive as to the change of property effected by the condemnation. But it is obvious that the point decided in that case depended, not upon some new principle peculiar to the sentences of foreign courts, but upon the application of a general rule of law to such sentences.

This case, as far as it goes, places a foreign sentence upon the same foundation as the sentence or decree of an English court acting upon the same subject; and we have seen that, by the general rule of law, the latter, if conclusive at all, is so as to the fact directly decided, as well as to the change of property produced by the establishment of the fact. Hence it would seem to follow, that if the sentence of a foreign court of admiralty be conclusive as to the property, it is equally conclusive of the matter or fact directly decided. What

is the matter decided in the case under consideration? That the vessel was seized whilst attempting to break a blockade, in consequence of which she lost her neutral character; and the change of property produced by the sentence of condemnation is a consequence of the matter decided, that she was, in effect, enemy-property. Can the parties to that sentence be bound by so much of it as works a loss of the property, because it was declared to be enemy-property, and yet be left free to litigate anew in some other form, the very point decided from which this consequence flowed? Or upon what just principle, let me ask, shall a party to a suit, who has once been heard, and whose rights have been decided by a competent tribunal, be permitted in another court of concurrent jurisdiction, and in a different form of action, to litigate the same question, and to take another chance for obtaining a different result? I confess I am strongly inclined to think that the case of *Hughes v. Cornelius* laid a strong foundation for the doctrine which was built upon it, and which for many years past has been established law in England. This opinion is given with the more confidence, when I find it sanctioned by the positive declarations of distinguished law characters — men who are, of all others, the best able to testify respecting the course of decisions upon the doctrine I am examining, and the source from which it sprung.

In the case of *Lothian v. Henderson*, 3 Bos. & Pull. 499, *Chambre, J.*, speaking upon this point, says that the sentence of the French court was in that case conclusive against the claim of the assured, "agreeable to all the decisions upon the subject, beginning with the case of *Hughes v. Cornelius* (confirmed as that was by the opinion of Lord Holt in two subsequent cases), and pursuing them down to the present period. It is true," he observes, "that in *Hughes v. Cornelius*, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, where the non-compliance with a warranty of neutrality is in dispute. But from that period to the present, the doctrine there laid down respecting foreign sentences has been considered equally applicable to questions of warranty in actions on policies, as to questions of property in actions of trover." *Le Blanc, J.*, says, "that these sentences are admissible and conclusive evidence of the fact they decide, it seems not safe now to question: From the time of *Car. II.* to this day, they have been received as such, without being questioned. In the discussion of the nature of such evidence before this house in 1776, it seems not to have been controverted; and the cases, I may say, are numberless, and the property immense, which have been determined on the conclusiveness of such evidence, in many of which cases the forms in which they came before the courts in Westminster Hall were such as to have enabled the parties, if any doubt had been entertained, to have brought the question before a higher tribunal." *Lawrence, J.*, also speaking of the legal effect of a foreign sentence upon this point, says, "as to

which, after the continued practice which has taken place from the earliest period, in which, in actions on policies of insurance, questions have arisen on warranties, to admit such sentences in evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purport to decide directly, I apprehend it is now too late to examine the practice of admitting them to the extent to which they have been received, supposing that practice might, upon the argument, have appeared to have been doubtful at first." Rooke, J., Lord Eldon, and Lord Alvanley, all concur in giving the same testimony, that the doctrine under consideration had been established for a long period of years, by a long series of adjudication in the courts of Westminster Hall.

I cite this case for no other purpose but to prove by the most respectable testimony, that the case of *Hughes v. Cornelius*, decided in the reign of Car. II., had, by a uniform course of decisions from that time, been considered as warranting the rule now so firmly established in England. And when the inquiry is, whether the application of the principle laid down in that case to questions arising on warranties in actions on policies, be of ancient or modern date, I think I may safely rely upon the declarations of the English judges, when they concur in the evidence they give respecting the fact. It is true that no case was cited at the bar recognizing the application of the rule to questions between the insurer and insured, prior to the revolution, except that of *Fernandez v. Da Costa*, which I admit was a *Nisi Prius* decision. But were I convinced that the long series of decisions upon this point, from the time of *Hughes v. Cornelius*, spoken of by the judges in the case of *Lothian v. Henderson*, had been made at *Nisi Prius*, it would not, in my mind, weaken the authority of the doctrine. It would prove the sense of all the judges of England, as well as of the bar, of the correctness and legal validity of the rule. It is not to be supposed that if a doubt had existed respecting the law of those decisions, the point would not have been reserved for a more deliberate examination, before some of the courts of Westminster Hall. But the case of *Fernandez v. Da Costa* receives additional weight, when it is recollected that the judge who decided it was Lord Mansfield, and when upon examining it, we find no intimation from him that there was any novelty at that day in the doctrine. To this strong evidence of the antiquity of the rule, may be added that of Judge Buller, who, at the time he wrote his *Nisi Prius*, considered it as then established.

That the doctrine was considered as perfectly fixed in the year 1781, is plainly to be inferred, from the case of *Bernardi v. Motteux*, decided in that year. Lord Mansfield speaks of it as he would of any other well established principle of law, declaring in general terms, that the sentence, as to that which is within it, is conclusive against all persons, and cannot be collaterally controverted in any other suit. The only difficulty in that case was, to discover the real ground upon which the

foreign sentence proceeded, and the court in that and many subsequent cases laid down certain principles auxiliary to the rule, for the purpose of ascertaining the real import of the sentence in relation to the fact decided as between the insurer and insured. For if the sentence did not proceed upon the ground of the property not being neutral, it of course concluded nothing against the insured; since upon no other ground could the sentence be said to falsify the warranty.

It was admitted by the counsel for the insured, that, as between him and the insurer, the sentence is *prima facie* evidence of a non-compliance with the warranty. But if they are right in their arguments as to the inconclusiveness of the sentence, I would ask for the authority upon which the sentence can be considered as *prima facie* evidence. Certainly no case was referred to, and I have not met with one to warrant the position. If we look to general principles applicable to domestic judgment, they are opposed to it. We have seen that the judgment is conclusive between the same parties, upon the same matter coming incidentally in question. The judgment of a foreign court is equally conclusive except in the single instance where the party claiming the benefit of it applies to the courts of England to enforce it, in which case only the judgment is *prima facie* evidence. But it is to be remarked, that in such a case the judgment is no more conclusive as to the right it establishes, than as to the fact it decides. Now it is admitted that the sentence of a foreign court of admiralty is conclusive upon the right to the property in question; upon what principle, then, can it be *prima facie* evidence, if not conclusive, upon the facts directly decided? A domestic judgment is not even *prima facie* evidence between those not parties to it, or those claiming under them, and that would clearly be the rule, and for a similar reason as to foreign judgments. If between the same parties, the former is conclusive as to the right and as to the facts decided. This principle, if applied at all to foreign sentences, which it certainly is, is either applicable throughout, upon the ground that the parties are the same, or if not so, then by analogy to the rule applying to domestic judgments, the sentence cannot be evidence at all.

Upon the whole, I am clearly of opinion, that the sentence of the court of admiralty at Barbadoes, condemning the brig "Fame," and her cargo as prize, on account of an attempt to break the blockade of Martinique, is conclusive evidence in this case against the insured, to falsify his warranty of neutrality.

If the injustice of the belligerent powers, and of their courts should render this rule oppressive to the citizens of neutral nations, I can only say with the judges who decided the case of *Hughes v. Cornelius*, let the government in its wisdom adopt the proper means to remedy the mischief. I hold the rules of law, when once firmly established, to be beyond the control of those who are merely to pronounce what the law is, and if from any circumstance it has become impolitic, in a national

point of view, it is for the nation to annul or to modify it. Till this is done, by the competent authority, I consider the rule to be inflexible.¹

HOHNER v. GRATZ.

CIRCUIT COURT OF THE UNITED STATES, SO. DIST. NEW YORK. 1892.

[*Reported 50 Federal Reporter, 369.*]

BROWN, District Judge. The recent adjudication in Germany which is sought to be set up as a supplemental answer in bar of complainant's demand, is not, in my judgment, entitled to the force of an adjudication in an action like the present. The relief prayed for is to restrain the violation of the complainant's trade-mark in harmonicas, through any sales of the infringing harmonicas by the defendant in this country. The granting of such relief has reference not merely to the complainant's rights, but to the protection of the American public against imposition. *Medicine Co. v. Wood*, 108 U. S. 218-223, 2 Sup. Ct. Rep. 436. The question whether the alleged infringement is likely to impose upon the public, or whether it involves an unfair and inequitable business competition, depends upon the circumstances of the place. An injunction might be properly refused in Germany, and yet properly granted here, from the different circumstances which would necessarily enter into the decision.

Comity, moreover, does not require, nor does public policy permit, that the protection of the citizens of this country against imposition in transactions within its own territory, should in any degree be held subject to the decisions of any foreign tribunal. See *Brimont v. Penniman*, 10 Blatchf. 436. Cases like the present have no analogy to suits upon foreign judgments rendered on contracts, or other subjects of ordinary common law right, and are not within such adjudications as that of *Hilton v. Guyott*, 42 Fed. Rep. 249, and the cases there cited. Here the subject-matter is a tort, and an imposition upon the public alleged to be committed or about to be committed here. Such subjects are not concluded by foreign adjudications, even when the acts referred to are the same identical acts. *Whart. Conf. Laws*, §§ 793, 827.

But here the particular subject-matter of the two actions is not identically the same. Though similar torts or imposition in Germany may

¹ *Acc. Lothian v. Henderson*, 3 B. & P. 499; *Bolton v. Gladstone*, 5 East, 155; *Baxter v. New England Marine Ins. Co.*, 6 Mass. 277. *Contra*, *Ocean Ins. Co. v. Francis*, 2 Wend. 64; *Williamson v. Tunno*, 2 Bay, 388.

The recitals of the judgment are conclusive only as to facts explicitly determined to be true as the immediate and necessary basis for the judgment: *Fisher v. Ogle*, 1 Camp. 418; *Hobbs v. Henning*, 17 C. B. N. s. 791; *Robinson v. Jones*, 8 Mass. 536; *Bailey v. S. C. Ins. Co.*, 3 Brev. 354; and only in a suit involving the identical property labelled: *The Mary*, 9 Cranch, 126.—Ed.

have been the subject of the suit in the German tribunal, those acts are not the same as similar torts committed here; nor is the defendant the same, though he may be the agent of the German defendant. What is sought here is to restrain this defendant's torts within this country, and his imposition upon the American public; and that is a different subject from a restraint upon the principal in Germany against similar torts committed there. The motion is, therefore, on both grounds denied.¹

GREAT WESTERN TELEGRAPH CO. v. PURDY.

SUPREME COURT OF THE UNITED STATES. 1896.

[*Reported 162 United States, 329.*]

THIS was an action brought, August 30, 1888, in the District Court of Des Moines County in the State of Iowa, by the Great Western Telegraph Company, a corporation of Illinois, by its receiver, Elias R. Bowen, against Hiram Purdy, a citizen of Iowa, to recover the sum of \$437.50, with interest from July 10, 1886, alleged to be due from him to the company under his subscription to its stock, and under a decree of the Circuit Court of Cook County in the State of Illinois of that date, which ordered an assessment upon the stockholders of the company, and which was alleged to have been made in a suit to which he was a party, and to be binding upon him.²

GRAY, J. By articles 4, section 1, of the Constitution of the United States, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof." In the exercise of the power so conferred, Congress, besides providing the manner in which the records and judicial proceedings of the courts of any State shall be authenticated, has enacted that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, that they have by law or usage in the courts of the State from which they were taken." Act of May 26, 1790, c. 11; 1 Stat. 122; Rev. Stat. § 905.

The plaintiff relied on the order of assessment, made by a court of the State of Illinois, as a judgment of that court, entitled to the effect of being conclusive evidence of the plaintiff's right to maintain this action against the defendant. The Supreme Court of the State of Iowa denied it that effect. The question whether that court thereby declined to give full faith and credit to a judicial proceeding of a court

¹ But see *Lea v. Deakin*, 11 Biss. 23. — ED.

² The statement of facts, arguments of counsel, and part of the opinion of the court are omitted. — ED.

of another State, as required by the Constitution and laws of the United States, was necessarily involved in the decision.

This court therefore has jurisdiction of the case, but must judge for itself of the true nature and effect of the order relied on. *Armstrong v. Treasurer of Athens County*, 16 Pet. 281, 285; *Texas & Pacific Railway v. Southern Pacific Co.*, 137 U. S. 48; *Grover & Baker Co. v. Radcliffe*, 137 U. S. 287; *Carpenter v. Strange*, 141 U. S. 87; *Huntington v. Attrill*, 146 U. S. 657, 666, 683-686, and cases cited.

By the original contract between the parties, made in the State of Iowa on February 16, 1869, Purdy, the present defendant, agreed to take fifty shares, of the par value of \$25, in the plaintiff company, and to pay five per cent (which he did) and "the balance as the directors from time to time may order;" and the company agreed to issue the shares to him as soon as forty per cent had been paid.

On November 19, 1869, Purdy and other subscribers for shares filed in a court of the State of Illinois a bill in equity to compel the company to issue shares to them, and to set aside as fraudulent a contract by which the company had agreed to transfer all its capital stock to one Reeve; and upon that bill, on November 16, 1872, obtained a decree, setting aside that contract, and ordering shares to be issued to the subscribers as prayed for, and a new board of directors to be chosen. By that decree, all the objects of the suit were accomplished, so far as Purdy was concerned; and he does not appear to have had any notice of, or part in, any further proceedings. That bill did not ask for the appointment of a receiver, or for any order of assessment upon stockholders.

The subsequent proceeding, begun September 19, 1874, alleging mismanagement and fraud of the new officers and the insolvency of the company, was by other stockholders, and although entitled a "supplemental bill," and permitted by the court to be filed in the former cause, was a distinct proceeding, in which Purdy had and took no interest. The orders of the court upon this proceeding, appointing on October 7, 1874, a receiver, and on July 10, 1886, making a "call or assessment" upon the stockholders of the company, were entered without any notice to him, or consent on his part. He was not personally a party to this proceeding, nor named therein. The receiver was appointed almost two years, and the assessment ordered more than thirteen years, after Purdy had ceased to have any connection with the litigation.

There can be no doubt that, as heretofore declared by this court, "after a decree disposing of the issues and in accordance with the prayer of a bill has been made, it is not competent for one of the parties, without a service of new process, or appearance, to institute further proceedings on new issues and for new objects, although connected with the subject-matter of the original litigation, by merely giving the new proceedings the title of the original cause. If his bill begins a new litigation the parties against whom he seeks relief are entitled to notice thereof, and without it they will not be bound." *Smith v. Woolfolk*, 115 U. S. 143, 148.

The question therefore is of the effect, as against Purdy, of the order for an assessment, made by the Illinois court in a proceeding to which the corporation was a party, but to which he personally was not.

The order of that court was in effect, as it was in terms, simply a "call or assessment" upon all stockholders who had not paid for their shares in full. It was such as the directors might have made before the appointment of a receiver; and in making it the court, having by that appointment assumed the charge of the assets and the affairs of the corporation, took the place and exercised the office of the directors. *Scovill v. Thayer*, 105 U. S. 143, 155; *Hawkins v. Glenn*, 131 U. S. 319, 329; *Lamb v. Lamb*, 6 Biss. 420, 454; *Glenn v. Saxton*, 68 Cal. 353; *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 636, 640; *Great Western Tel. Co. v. Loewenthal*, 154 Ill. 261.

The order of assessment, whether made by the directors as provided in the contract of subscription, or by the court as the successor in this respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder, without personal notice to him. *Hawkins v. Glenn*, 131 U. S. 319; *Glenn v. Liggett*, 135 U. S. 533; *Glenn v. Marbury*, 145 U. S. 499.

But the order was not, and did not purport to be, a judgment against any one. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defence which he might have to an action upon that contract.

In this action, therefore, brought by the receiver, in the name of the company, as authorized by the order of assessment, to recover the sum supposed to be due from the defendant, he had the right to plead a release, or payment, or the statute of limitations, or any other defence, going to show that he was not liable upon his contract of subscription.

In each of the three cases last cited above, the defence of the statute of limitations was entertained and passed upon. *Hawkins v. Glenn*, 131 U. S. 332; *Glenn v. Liggett*, 135 U. S. 547; *Glenn v. Marbury*, 145 U. S. 506.

The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine whether the present defendant, or any other particular stockholder, was liable for anything, the Iowa court, by sustaining the defence of the statute of limitations, did not deny to the judicial proceeding of Illinois the full faith and credit to which it was entitled.¹

¹ The judgment of a foreign court levying the assessment is conclusive as to the validity of the assessment. *Hawkins v. Glenn*, 131 U. S. 319; *Lehman v. Glenn*, 87

OVERBY v. GORDON.

SUPREME COURT OF THE UNITED STATES. 1900.

[Reported 177 *United States*, 214.]

THE proceedings under review originated in the Supreme Court of the District of Columbia, by the filing in that court, on January 23, 1896, of a petition on behalf of Mrs. Gordon, the appellee herein. The object of the petition was to obtain the probate, as the last will and testament of Hugh A. Haralson, of a paper purporting to have been executed by Haralson, and to obtain a grant of letters of administration thereon, with the will annexed. It was averred that Haralson, at the time of his death and for several years prior thereto, had been a resident of the District of Columbia, and that he died on August 23, 1895, in the county of De Kalb, State of Georgia, possessed of personal property of the value of about ten thousand dollars, all of which, except an insignificant part thereof, was at the time in the District of Columbia.

At the trial the jury found that Haralson died domiciled in the District of Columbia, and left personal estate there.

A caveat was filed by other next of kin of Haralson contesting the validity of the alleged will and the domicile of the deceased in the District of Columbia. At the trial the caveators offered in evidence a certified transcript of record from the De Kalb Court of Ordinary, De Kalb County, in the State of Georgia. This record showed the appointment in May, 1896, of Logan Bleckley as administrator.

It is further recited in the bill of exceptions that the transcript referred to was offered as tending to show that the decedent had died a resident of De Kalb County, Georgia, intestate, "and that Mrs. Gordon was thereby estopped to deny that fact." The trial court, however, refused to admit the record in evidence, and an exception was duly taken to such refusal.

An order was entered admitting the will to probate and record as the last will and testament of the decedent, and letters of administration *cum testamento annexo* were decreed to issue to Hugh H. Gordon, a son of the petitioner. An appeal was thereupon taken by the caveators to the Court of Appeals of the District of Columbia. That court affirmed the order of the lower court (Mr. Chief Justice Alvey dissenting), (13 App. D. C. 392,) and a writ of error was then sued out from this court.¹

WHITE, J. . . . Was the grant of letters of administration by the

Ala. 618; Glenn v. Williams, 60 Md. 93; Mut. Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170, 66 N. W. 1095; Commonwealth Mut. Fire Ins. Co. v. Hayden, 60 Neb. 636, 83 N. W. 992; Parker v. Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751. — ED

¹ The statement of facts is abridged, and part of the opinion is omitted. — ED.

Court of Ordinary of De Kalb County, Georgia, competent evidence upon the issue tried in the Supreme Court of the District of Columbia respecting the domicil of the decedent at the time of his death?

In determining this question it is important to keep in mind the following facts:—

At the time when the proceedings before the De Kalb court were instituted (April, 1896), the estate of the deceased, with but a trifling exception, was within the District of Columbia. Not only this, but upon the ground that the domicil of Haralson at his death was the District of Columbia, the jurisdiction of a competent court of the District had been invoked as early as January 23, 1896, for the probate of an alleged last will and testament of Haralson and for the grant of letters of administration *cum testamento annexo*; and on March 6, 1896, the next of kin, other than the proponent of the alleged will, had filed a caveat in said court of the District of Columbia contesting the application for probate and grant of letters. Four days before the certification of issues framed by reason of such contest, to be tried before a jury, the caveators before the Supreme Court of the District of Columbia initiated the proceedings before the De Kalb County Court. It was upon the hearing had in the Supreme Court of the District of Columbia upon the issues certified on April 10, 1896, that the adjudication of the De Kalb County Court was offered in evidence upon the issue in respect to the domicil of the decedent at his death. . . .

As said by this court in *Veach v. Rice*, 131 U. S. 298, courts of ordinary in Georgia are courts of record, having exclusive and general jurisdiction over the estates of decedents, and no question has been raised as to the observance of the requirements of the statutes of Georgia in the proceedings which culminated in the appointment of the Georgia administrator.

The transcript referred to, however, undoubtedly only justifies the inference that none other than the statutory notice by publication was given, and that no contest was had in respect to the grant of letters.

Jurisdiction is the right to hear and decide, and it must be exercised, speaking in a broad sense, in one of two modes, — either *in rem* or *in personam*.

It will be observed that the statutory notice above referred to was not required to be directed against named individuals, nor had it for its object the obtaining of specific relief against any one, but it was to be general, and its purpose was to warn all persons that it was proposed by the court of ordinary to determine whether a legal representative should be appointed to administer the property of the deceased within the State of Georgia. The notice and proceeding was obviously intended to have no greater force or efficacy against persons resident in the State of Georgia than against individuals who might be resident without the State. It results that the proceedings referred to were not intended to constitute and did not amount to an action *in personam*.

This results from the fact that they were devoid of the elements essential to an action *in personam*; and, if not proceedings purely *in rem*, they possessed so much of the characteristics thereof, as not to warrant the allowance of greater efficacy than is accorded to a proceeding of that nature.

An essential characteristic, however, of a proceeding *in rem* is that there must be a *res* or subject-matter upon which the court is to exercise its jurisdiction. In cases purely *in rem*, as in admiralty and revenue cases for the condemnation or forfeiture of specific property, a preliminary seizure of the property is necessary to the power of the court to adjudicate at all. In other cases, where the proceedings are in form *in personam*, but the court is unable to acquire jurisdiction of the person of the defendant, by actual or constructive service of process, the action may proceed, as one *in rem* against the property of which a preliminary seizure or its equivalent has been made; or, jurisdiction may be exercised without such preliminary seizure, where the relief sought is an adjudication respecting the title to or validity of alleged liens upon real estate situate within the jurisdiction of the court. *Roller v. Holly*, 176 U. S. 398. To the class of cases where the proceedings are in form *in rem* may be added those connected with the grant of letters either testamentary or of administration.

From the record of the proceedings instituted in the De Kalb County Court it is apparent that the ultimate purpose was to adjudicate upon and decree distribution of the estate of the deceased, the appointment of an administrator being a mere preliminary step in the management and control by the court of assets of the estate. The question of domicile would seem to have been important only as establishing the particular court of ordinary which was vested with jurisdiction to administer the assets within the State of Georgia. The subject-matter or *res*, upon which the power of the court was to be exercised, was, therefore, the estate of the decedent.

The sovereignty of the State of Georgia and the jurisdiction of its courts, however, did not extend to and embrace property not situated within the territorial jurisdiction of the State. To quote the language of Mr. Chief Justice Marshall in *Rose v. Himely*, 4 Cranch, 241, 277:—

“It is repugnant to every idea of a proceeding *in rem* to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*.”

As said also in *Pennoy v. Neff*, 95 U. S. 714, 722:—

“Except as restrained and limited by the Constitution, the several States of the Union possess and exercise the authority of independent States, and two well established principles of public law respecting the jurisdiction of an independent State over persons and property are applicable to them. One of these principles is, that every State pos-

sesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . .

“The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. (Story, *Confl. Laws*, c. 2; Wheat. *Int. Law*, pt. 2, c. 2.) The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. ‘Any exertion of authority of this sort beyond this limit,’ says Story, ‘is a mere nullity, and incapable of binding such persons or property in any other tribunals.’ Story, *Confl. Laws*, sect. 539.”

Now, it is undeniable that the sovereignty of the State of Georgia and the jurisdiction of its courts at the time of the adjudication by the De Kalb County Court, by the grant of letters of administration on the estate of Haralson, did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia, and, viewed as a step in a proceeding *in rem* relating to property within the jurisdiction of the court, the adjudication of a grant of letters would have no binding probative force in contests respecting property lying outside of the territorial dominion of the State of Georgia. The decisions in *Robertson v. Pickrell*, 109 U. S. 608, and in the cases there relied upon, furnish illustrations of this principle. Thus, in the case just named, it was held that the act of Congress declaring the force and efficacy which the records and judicial proceedings of one State should have in the courts of another State did not require that they should have any greater force and effect in another State than in the State where such records and judicial proceedings originated and were had; that the probate of a will in one State, by a proceeding not adversary in character, merely established its sufficiency to pass all property which could be transferred in that State by a valid instrument of that kind, and the validity of the will in that State; and that such probate did not conduce to establish the facts upon which the probate proceeded, in proceedings respecting real property situated in another State, except as permitted by the laws of such other State.

The reasoning upon which we base the conclusion that the transcript of record of the grant of letters by the De Kalb County Court was not entitled to probative force in the courts of another State in the controversy over the administration of assets not within the territorial jurisdiction of the State of Georgia, at the time the grant of letters was made, finds support in the opinion delivered by Lord Blackburn in *Concha v. Concha*, 11 App. Cas. p. 541, a case referred to in terms of approval in *Thormann v. Frame*, 176 U. S. 350, where was involved a controversy in some of its features analogous to that presented in the case at bar. The facts in the Concha case were as follows:—

After contest between a daughter of a decedent and the executors named in a document which purported to be a last will and testament, the paper was admitted to probate by a judge of a probate court in London, and he expressly decided, upon an issue framed in a contest between the daughter and executors as to the domicile of the decedent, in favor of the domicile being in England, and not in Chili, as was claimed by the daughter. In a subsequent action before the Court of Chancery for distribution of the assets, the daughter again sought to litigate the question as to the domicile of her father, and her right to do so was finally adjudicated by the House of Lords. The executors, or those who had succeeded them in the management of the administration suit, attempted to avail of the decree of the probate court as conclusive upon the question of domicile, first, as a proceeding *in rem*, which operated an estoppel against all the world; and, second, as a proceeding *inter partes*, operative as *res adjudicata*, by reason of the actual contest made by the daughter. The decree of the probate court, however, was held not conclusive *in rem* as to the domicile, because the finding as to domicile was not necessary to the decree of the judge of probate, nor conclusive *inter partes*, as the pending controversy was substantially between the daughter and the residuary legatee, and as the latter could not be bound by an adjudication upon a question not necessary to be litigated in the probate court, and as estoppels must be mutual, the daughter could not be bound. This decision of the House of Lords, it will be borne in mind, was as to the effect to be given in one judicial tribunal in England to the decision of another court of the same country. In the course of his opinion Lord Blackburn (who perhaps had in mind doubts intimated in the Court of Appeals, 29 Ch. D. 268, 276, as to whether the findings on which a judgment *in rem* is based, are in all cases conclusive against the world) said (p. 562):—

“What he (the Probate Judge) did decide was (and to that extent I think the decision was conclusive on everybody), that there was an executor who was entitled to have probate in England for the purpose of getting in and taking the property which was in England, and to that he was entitled if there was a will which made that executor a good executor according to the law of England; but I do not think that Sir Creswell Creswell had any power to say that the testator was or was not really a domiciled Englishman. If he had been a domiciled American or domiciled in any other country, I do not think that a decision of the judge of our probate court, saying, ‘I find him to be a domiciled Englishman, and, therefore, on that account grant probate,’ would be at all conclusive upon the court of another country to oblige them to admit that he was a domiciled Englishman, when in fact he was not; or, putting it the converse way, that if a Chilian court had chosen to say that some very wealthy man was a domiciled Chilian, and had therefore granted probate, the law of nations would require that to conclude any person from saying in this country that he was not so.”

Again, after referring to the fact that upon the executor proposing to prove the will, a caveat was entered upon which it was said the probate judge entered into an inquiry whether or not the testator was domiciled in England, and found that he was, Lord Blackburn observed (p. 564) :—

“It is said that upon the caveat in the suit an order was drawn up, which may perhaps not mean that, but which does look extremely as if the registrar entered the judgment that the judge did find it. I cannot think that if he had done that it would have bound everybody universally as being a judgment *in rem*. I have instanced a sort of illustration of it. Supposing he had done so, and supposing that he was wrong, and the fact was that the testator had not been really domiciled in England, but had been domiciled, say, in the United States, in New York we will suppose, could it possibly have been said that the court of New York (which undoubtedly would have the same general law of nations as we have, following the law of the domicile to distribute the property) would have respected the decision of the Judge Ordinary, it establishing that this will was proved conclusively as being enough to make this person executor and the representative in England to obtain the English property—could it have been said that the Judge Ordinary having erroneously found that the testator was domiciled in England when in fact he was a domiciled citizen of the United States, it was to conclude them and conclude everybody to the fact that he was a domiciled Englishman until a foreigner had come to the court of this country to obtain a reversal? I cannot think so. If that was so, how could it as a matter *in rem* be decisive as regards the reason upon which the judge of the probate court had gone? I cannot think that it would be.”

In *Blackburn v. Crawford's Lessee*, 3 Wall. 175, and a continuation of the same action under the title of *Kearney v. Denn* (15 Wall. 51), the sole question at issue in the action (ejectment) was the validity of an asserted marriage. At the trial the defendant offered in evidence, as a conclusive estoppel against all the lessors of the plaintiff and as *prima facie* evidence to support the issue on his part, a transcript from the records of the Orphans' Court of Prince George's County, Maryland, and proposed to read therefrom the verdict of the jury and the order of the Orphans' Court thereon on certain issues sent from the Orphans' Court to the Circuit Court of said county. These issues had been framed upon a contest, initiated in the Orphans' Court, by one of the lessors of the plaintiff who resisted an application of Blackburn for the grant to him of letters of administration on the estate of a certain intestate, such lessor asserting that he was nearest of kin to the intestate, and that letters should be granted to him. The verdict in the contest was against the validity of the claimed marriage. On the trial in the action in ejectment the jury found in favor of the fact of marriage. This court—the trial judge in the action in ejectment having excluded the transcript referred to—held that the decree upon the

contest was competent evidence and operated an estoppel as against the lessor of the plaintiff who was a party to the contest, but that the adjudication did not affect the other lessors, who were not parties to such contest. Obviously, the decision proceeded upon the assumption that as the Orphans' Court possessed no general jurisdiction over the real estate of a decedent, its action upon the application for grant of letters, regarded as a proceeding *in rem*, possessed no probative force in contests over such property. This, of course, in nowise impugned the principle that all parties to a contest, in proceedings in a probate court preliminary to and during the course of administration upon the estate of the decedent, upon a matter within the jurisdiction of the court, are concluded in every other court by the decision rendered, as to the facts upon which such decision necessarily proceeded. *Caujolle v. Ferrié*, 13 Wall. 465. And see *Butterfield v. Smith*, 101 U. S. 570.

We are of the opinion that the De Kalb County Court possessed the power to determine the question of domicile of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicile, by a mere finding of such a fact in a proceeding *in rem*. In other words, proceedings which were substantially *ex parte* cannot be allowed to have greater efficacy than would a solemn contest *inter partes*, which would have estopped only actual parties to such a contest as to facts which had been or might have been litigated in such contest.

Our conclusion being that the adjudication of the fact of domicile in Georgia made in the grant of letters by the De Kalb County Court, and which was not made in a contest *inter partes*, was of no probative force upon the question of domicile in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the Supreme Court of the District did not err in excluding the transcript in question, whether tendered as evidence conducing to establish or as conclusively fixing the domicile of the deceased. And this conclusion is not affected in the least by the circumstance that on the trial of the issue as to domicile had in the Supreme Court of the District of Columbia it was claimed that the assets within the District of Columbia at the time of the filing of the caveat by the next of kin had been thereafter, without the sanction of the court, removed from the District of Columbia by one of the caveators. The trial court properly declined to rule that delivery of such assets operated to protect those who made the surrender, as against an administrator appointed within the District, subsequent, it is true, to such delivery, but as the result of proceedings for the appointment of an administrator which were pending in a proper court of the District at the time of the delivery, and when the person in whose name the Georgia letters were issued was a party to the proceedings previously instituted and then pending in the District. Nor

was the trial court required to determine that upon proper application to the Georgia court the administrator appointed by the court would not be ordered to deliver up the assets removed by him from the District.

Allusion has been made to an act of Congress of February 28, 1887, c. 281, 24 Stat. 431, which makes it lawful for any person or persons to whom letters testamentary or of administration may be granted by proper authority, in any of the United States or the Territories thereof, to maintain any suit or action and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said District. We do not construe that statute, however, as having any relation to a case of the kind we are now considering. In other words, the statute cannot in reason be interpreted as directing that where a proper court of the District of Columbia had obtained jurisdiction by proceedings commenced before it for administration upon property within the District, it should be obliged to dismiss such proceedings because one who was a party before it chose, whilst issues in such proceedings were pending and undecided, to go to a State and there make application for letters of administration, basing such application upon the asserted fact that the deceased had been domiciled in such State.

Whilst it may be conceded that, in consequence of the statute, as a general rule, a debtor residing in the District of Columbia, of a deceased person, may be protected in making payment to an administrator appointed in another jurisdiction, the asserted domicil of the deceased (*Wilkins v. Ellett*, 108 U. S. 256), this does not make it necessary for us to decide that the payment or delivery of the assets in the District of Columbia, which was made to the Georgia administrator after the commencement of proceedings for the administration of the assets within the District of Columbia, based upon the ground of the domicil of the deceased having been in said District, was lawful. To determine this question would involve a consideration of other provisions of the statute, and as to whether the person making the payment was or not to be charged with notice of the then pending proceedings in the Supreme Court of the District, which, of course, were matter of public record. The question, however, is not before us for review, and we do not, therefore, express an opinion in regard thereto.

Further, in the light of the decision of the Supreme Court of Georgia in the case of *Thomas v. Morrisett*, 76 Ga. 384, and an analogous decision by the Supreme Court of Errors of Connecticut, in *Willetts's Appeal from Probate*, 50 Conn. 330, it would seem altogether probable that the De Kalb County Court, upon application made to it, will order its appointee to surrender to the administrator appointed in the District of Columbia the assets which were by the former removed from the District during the pendency therein of the proceedings for administration.

Finding no error in the record, the judgment of the Court of Appeals of the District of Columbia is

*Affirmed.*¹

Mr. Justice BROWN concurred in the result.

CLARKE v. CLARKE.

SUPREME COURT OF THE UNITED STATES. 1900.

[*Reported 178 United States, 186.*]

WHITE, J. The Supreme Court of Errors of Connecticut held that the will of Julia H. Clarke, wife of the plaintiff in error, did not at the time of her death work an equitable conversion into personalty of the real estate situated in the State of Connecticut, and consequently, that though personal property might be governed by the law of the domicile, real estate within Connecticut was controlled by the law of Connecticut, and hence that Nancy B. Clarke, as surviving sister of Julia Clarke, inherited, under the laws of Connecticut, to the exclusion of the father, the interest of the deceased sister Julia in the real estate in Connecticut which had passed to Julia by the will of her mother. It is assigned as error that in so deciding the Connecticut court refused full faith and credit to the decree of the courts of South Carolina, wherein it was adjudged that the will of Mrs. Clarke had the effect of converting her real estate, *wherever situated*, into personalty; the deduction being that as under the South Carolina decision the real estate situated in Connecticut became personal property, it was the duty of the Connecticut court to have decided that the land passed by the law of South Carolina and not according to the law of Connecticut, and hence, that instead of treating the daughter Nancy as the owner of the whole of the real estate, it should have recognized the father as having a half interest therein. And the correctness of this proposition is really the only question which the assignment of errors presents for our decision.

The argument at bar has taken a wide range, and the various legal principles by which it was deemed that a solution of the controversy might be facilitated have been supported by a very elaborate reference to authority. We do not deem it necessary, however, to critically review the cases cited and the observations of text writers which were relied on in argument, nor to analyze all the contentions which it is

¹ *Acc. In re Gaines*, 84 Hun, 520; *Bowen v. Johnson*, 5 R. I. 112.

A decree by the proper court of the testator's domicile that a will is valid should have force everywhere. *Succession of Gaines*, 45 La. Ann. 1237; *Dalrymple v. Gamble*, 68 Md. 523. But see *Bowen v. Johnson*, 5 R. I. 112. So a determination of the proper distributees by such a court binds all other courts. *In re Trufort*, 36 Ch. D. 600; *Ennis v. Smith*, 14 How. 400, 430. So of a decision that a will creates a trust. *Smith v. Central Trust Co.*, 154 N. Y. 333; 48 N. E. 553. — Ed.

asserted those authorities sustain. We say this, because, in our opinion, the matter at issue may be disposed of by the application of two well defined and elementary legal principles.

It is a doctrine firmly established that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy. This familiar rule has been frequently declared by this court, a recent statement thereof being contained in the opinion delivered in *De Vaughn v. Hutchinson*, 165 U. S. 566, where the court said (p. 570) :—

“It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. *United States v. Crosby*, 7 Cranch, 115; *Clark v. Graham*, 6 Wheat. 577; *McGoon v. Scales*, 9 Wall. 23; *Brine v. Insurance Co.*, 96 U. S. 627.”

Now, in the case at bar, the courts of Connecticut, construing the will of Mrs. Clarke, have declared that, by the law of Connecticut, land situated in that State, owned by Mrs. Clarke at her decease, continued to be, after her death, real estate for the purpose of devolution of title thereto. The proposition relied on, therefore, is this, although the court of last resort of Connecticut (declaring the law of that State) has held that the real estate in question had not become personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut, and therefore is equivalent to denying the correctness of the elementary proposition that the law of Connecticut where the real estate is situated governed in such a case. It is conceded that, had the will been presented to the courts of Connecticut in the first instance and rights been asserted under it, the operative force of its provisions upon real estate in Connecticut would have been within the control of such courts. But it is said a different rule must be applied where the will has been presented to a South Carolina court and a construction has been there given to it; for, in such a case, not the will but the decree of the South Carolina court, construing the will, is the measure of the rights of the parties, as to real estate in Connecticut. The proposition, when truly comprehended, amounts but to the contention that the laws of the respective States controlling the transmission of real property by will, or in case of intestacy, are operative only, so long as there does not exist in a foreign jurisdiction a judgment or decree which in legal effect has changed the law of the situs of the real estate. This is but to contend that what cannot be done directly can be accomplished by indirection, and that the fundamental principle which gives to a sovereignty an exclusive jurisdiction over the land within its borders is in legal effect dependent upon the non-existence of a decree of a court of another sovereignty de-

termining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its exercise may be thus frustrated at any time. These conclusions are not escaped by saying that it is not the law of Connecticut which conflicts with the interpretation of the will adopted by the South Carolina court, but the decision of the court of Connecticut which does so. In this forum, the local law of Connecticut as to real estate is the law of that State as announced by the court of last resort of that State.

As correctly observed in the course of the opinion delivered by the Supreme Court of Errors of Connecticut, the question as to the operative effect of the will of Mrs. Clarke, upon the status of land situated in Connecticut, was one directly involving the mode of passing title to lands in that State. This resulted from the fact that if the will worked a conversion into personalty immediately upon the death of Mrs. Clarke, as contended, it necessarily vested her executor with authority at once to sell and convey the real estate in Connecticut by a deed sufficient, under the laws of that State, to transfer title to real estate — a power which was held by the courts of Connecticut not to have been conferred. Had the executor assumed to exercise such a power, however, the validity or invalidity of a conveyance thus executed would have been one exclusively for the courts of Connecticut to determine, just as would have been the question of the sufficiency of the will to vest title. Such being the case, there is no basis for the contention that it was not the exclusive province of the courts of Connecticut to determine, prior to the execution of such a conveyance, whether or not the power to do so existed.

As further observed by the Connecticut court, whether Mr. Clarke, as executor and trustee under the will of his wife, had any power, duty, or estate with respect to lands situated in Connecticut, depended upon the laws of that State. The courts of the domicile of Mrs. Clarke could properly be called upon to construe her will so far as it affected property which was within or might properly come under the jurisdiction of those tribunals. If, however, by the law as enforced in Connecticut, land in Connecticut owned by Mrs. Clarke at her decease was real estate for all purposes, despite the provisions contained in her will, that land was a subject-matter not directly amenable to the jurisdiction of the courts of another State, however much those courts might indirectly affect and operate upon it in controversies, where the court, by reason of its jurisdiction over persons and the nature of the controversy, might coerce the execution of a conveyance of or other instrument incumbering such land.

And the cogency of the reasons just given is further demonstrated by considering the case from another though somewhat similar aspect. The decree of the South Carolina court, which, it is contended, had the effect of converting real estate situated in Connecticut into personal property, was not one rendered between persons who were *sui juris*.

Nancy B. Clarke, one of the parties to the suit in South Carolina, and whom the Connecticut court has held inherited, to the exclusion of the father, under the laws of Connecticut, the whole of the real estate belonging to her sister, was a minor. She was therefore incompetent, in the proceedings in South Carolina, to stand in judgment for the purpose of depriving herself of the rights which belonged to her under the law of Connecticut as to the real estate within that State. Neither the executor or trustee under the will, or the guardian *ad litem*, or any other person assuming to represent the minor in South Carolina, had authority to act for her *quo ad* her interest in real estate beyond the jurisdiction of the South Carolina court, and which was situated in Connecticut.

It cannot be doubted that the courts of a State where real estate is situated have the exclusive right to appoint a guardian of a non-resident minor, and vest in such guardian the exclusive control and management of land belonging to said minor, situated within the State. This court had occasion to consider and pass upon this doctrine in the case of *Hoyt v. Sprague*, 103 U. S. 613, and, in the course of the opinion, it was said (p. 631) :—

“One of the ordinary rules of comity exercised by some European States is to acknowledge the authority and power of foreign guardians, that is, guardians of minors and others appointed under the laws of their domicile in other States. But this rule of comity does not prevail to the same extent in England and the United States. In regard to real estate it is entirely disallowed; and is rarely admitted in regard to personal property. Justice Story, speaking of a decision which favored the extraterritorial power of a guardian in reference to personal property, says: ‘It has certainly not received any sanction in America, in the States acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators.’ Story, *Conf. Laws*, §§ 499, 504, 504 *a*. And see Wharton, *Conf. Laws*, §§ 259–268, 2d ed.; 3 Burge, *Colon. & For. Laws*, 1011. And some of those foreign jurists who contend most strongly for the general application of the ward’s *lex domicilii* admit that, when it comes to the alienation of foreign assets, an exception is to be made in favor of the jurisdiction within which the property is situate, for the reason that this concerns the ward’s property, and not his person. Wharton, §§ 267, 268.”

Of what efficacy, however, would be the power of one State to control the administration, through its own courts, of real estate within the State, belonging to minors, without regard to the domicile of the minor, if all such real estate could be disposed of and the administration thereof be controlled by the decree of the court of another State. Here, again, the argument relied on must rest upon the false assump-

tion that an exclusive power which confessedly exists in the courts of one jurisdiction may be wholly destroyed or rendered nugatory by the action of the courts of another jurisdiction in whom is vested no authority whatever on the subject. It results that no person before the South Carolina court, assuming to speak for the estate of Nancy B. Clarke, represented any real property of said Nancy which was not within the territorial jurisdiction of South Carolina, and the decree, therefore, could not affect land in Connecticut, an interest which was not before the court.

When, therefore, Henry P. Clarke, as administrator, appointed in Connecticut, of the estate of his deceased daughter, Julia Clarke, applied to the Connecticut probate court to determine who was entitled to the "real estate" owned by the intestate, it was the province of the Connecticut court to decide such question solely with reference to the law of Connecticut. Its power in this regard was not limited by the fact that in order to determine who owned the real estate, it was necessary for the court to construe the will of the mother of the intestate, and to determine what effect it had upon the status of the real estate under the law of Connecticut. Having a right to decide these questions, it was not constrained to adopt the construction of the will which had been announced by the court of South Carolina. From these conclusions it follows that because the court of Connecticut applied the law of that State in determining the devolution of title to real estate there situated, thereby no violation of the constitutional requirement that full faith and credit must be given in one State to the judgments and decrees of the courts of another State, was brought about, as the decree of the South Carolina court, in the particular under consideration, was not entitled to be followed by the courts of Connecticut, by reason of a want of jurisdiction in the court of South Carolina over the particular subject-matter which was sought to be concluded in Connecticut by such decree. *Thompson v. Whitman*, 18 Wall. 457; *Cole v. Cunningham*, 133 U. S. 107; *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287; *Simmons v. Saul*, 138 U. S. 439; *Reynolds v. Stockton*, 140 U. S. 254; *Cooper v. Newell*, 173 U. S. 555.

Judgment affirmed.

LA SOCIÉTÉ DE NAVIGATION FRAISSINET ET
COMPAGNIE *v.* NAVILLE.

COURT OF APPEAL OF GALATZ (ROUMANIA). 1898.

[*Reported 27 Clunet*, 1037.]

A. NAVILLE, a distiller of liquors at Tecuci, Roumania, had shipped a quantity of liquors by la Société de Navigation Fraissinet et Cie of Marseilles. A serious damage happened in transit to the goods

shipped. Naville before the Tribunal of Bordeaux sued the railway company, which in its turn vouched to warranty la Société Fraissinet et Cie, because the damage happened during the sea carriage. The Tribunal and the Court of Bordeaux, holding the limitation of liability in the contract of carriage null, gave judgment for Naville, and condemned la Société Fraissinet et Cie. The company, having paid the judgment, appealed to the Court of Cassation, which held the limitation of liability valid and sent the suit back to the Court of Agen, which, in conformity with the opinion of the Court of Cassation, dismissed the action of Naville et Cie and gave judgment for la Société Fraissinet et Cie. The latter brought suit in the Tribunal of Tecuci to recover the amount paid (7,033 francs), and on appeal to the Court of Appeal of Galatz, the court rendered a judgment in favor of Naville against la Société Fraissinet et Cie.

THE COURT.¹ The defendant Naville claims that the judgment of the Court of Agen cannot be set up against him because he was not regularly served with process when the judgment was pronounced, and also because the judgments of French courts have not the force of *res judicata* with us, since there is no treaty of reciprocity in this matter between France and Roumania. . . .

According to article 374 of the Code of Civil Procedure, judgments pronounced in a foreign country can be executed in Roumania only in the manner and within the limits in which in that foreign country the decisions of Roumanian judges are executed, after being declared executory by the competent judges. There now exists between the Kingdom of Roumania and the Republic of France no treaty for the reciprocal execution of judicial decisions pronounced in the two States, and in fact these judgments are not executed. The decisions of the French court which have been referred to have no legal force with us, and consequently la Société Fraissinet et Cie cannot rely upon any of them to prove before the courts of Roumania that Naville detains without legal excuse the sum claimed; it therefore remains for us to determine for ourselves whether Naville legally detains this sum.²

¹ Part only of the opinion is given. — ED.

² The court held that Naville's claim was legally justified, and therefore that he rightfully retained the amount paid him by the Navigation Company.

STATESCU, J., dissented from the decision. While agreeing with the majority in their statement of the law, he held that the plaintiff was not relying on a foreign judgment, but that the defendant was doing so to justify himself in retaining the amount paid to him.

“One must not confound the executory force and the authority of a judgment with the *res judicata*. The latter has its source in the power of the judge to end the dispute submitted to him, that is, his jurisdiction. The former is given him by the law and the judicial power of the country where the judgment is to be put in execution. The authority of *res judicata* belongs in fact to a foreign judgment. Though it has not full executory force outside the limits of the State where it was pronounced, it nevertheless constitutes, in favor of the party who has obtained it, a right which can be set up in any country against the other party. This necessarily results from the judicial contract entered into by parties to lawsuits. To decide otherwise would be to yield to old

SECTION IV.

THE EFFECT OF A JUDGMENT ON PROPERTY.

HUGHES v. CORNELIUS.

KING'S BENCH. 1680.

[*Reported 2 Shower, 232.*]

TROVER brought for a ship and goods, and on a special verdict there is found a sentence in the Admiralty Court in France, which was with the defendant.

And now *per Curiam* agreed and adjudged, that as we are to take notice of a sentence in the admiralty here, so ought we of those abroad in other nations, and we must not set them at large again, for otherwise the merchants would be in a pleasant condition; for suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the courts abroad unravel this? It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars. If you are aggrieved you must apply yourself to the king and council; it being a matter of government he will recommend it to his liege ambassador if he see cause; and if not remedied, he may grant letters of marque and reprisal.

And this case was so resolved by all the Court upon solemn debate; this being of an English ship taken by the French, and as a Dutch ship in time of war between the Dutch and the French.

Judgment for the defendants.

CASTRIQUE v. IMRIE.

HOUSE OF LORDS. 1870.

[*Reported Law Reports, 4 House of Lords, 414.*]

THE ship "Ann Martin," of Liverpool, Benson, master, was supplied with necessaries at Melbourne by Messrs. Levien & Stenetz. Benson drew a bill in payment on Claus, then the owner, for the sum of £601.16s. 6d. Claus became bankrupt, and the bill was dishonored: the ves-

theories now banished from the Italian law; theories which, exaggerating the principle of the reciprocal independence of nations, resulted in the denial of any kind of force to every judgment beyond the boundaries of the State where it was pronounced." Court of Messina, Aug. 20, 1884. 12 Clunet, 453. — ED.

sel had meanwhile been transferred to Castrique, and the bill had been indorsed to Messrs. Trotteaux & Co., of Havre. The vessel being in Havre, Messrs. Trotteaux & Co. commenced in the Tribunal of Commerce there, a suit against Benson on the bill. Benson was cited and appeared, but did not defend the suit. Judgment was given against Benson as master "and by privilege on that vessel" to pay the amount. The ship was seized upon the judgment, but could not be sold till the judgment was ratified by the Civil Tribunal of the same district. That court confirmed the judgment, and, after hearing the parties interested and receiving evidence of the law of England, refused to modify its action. The Court of Appeal of Rouen affirmed the action of the Civil Tribunal of Havre. A sale of the vessel was made under order of court, and the defendant, an Englishman, became the purchaser. Upon his bringing the vessel to England, Castrique brought an action in the Court of Common Pleas to recover it, on the ground that the sale in France was illegal and void as against his earlier title. The Court of Common Pleas gave judgment for Castrique; this was reversed in the Court of Exchequer Chamber. The case was then brought up to this House on error. The judges were summoned.¹

BLACKBURN, J. My Lords, I have the honor to deliver the joint opinion of my Brothers BRAMWELL, MELLOR, BRETT, CLEASBY, and myself.² . . .

What were the nature and effect of the proceedings in France—what jurisdiction the courts there had? and what the effect of their determinations really was? are all questions depending on the French law, and it must be ascertained as a fact what that French law is. When once that fact is ascertained, it becomes a question of English law to determine what effect is to be given to it in an English court.

In the present case the parties at the trial agreed upon a statement of the facts, and gave the court authority to draw inferences from them; but, unfortunately, they have stated the facts as to the French law very imperfectly, and the result has been that the Court of Common Pleas has drawn one inference as to the French law, and the Court of Exchequer Chamber has drawn another. It is very possible that a French lawyer may justly say that neither is right; it is quite certain that both cannot be. It is now for your Lordships to determine what the proper inference is, and on that point we must express our opinion. It is quite possible that the inference we draw may not be the correct one, but we apprehend that all that can be required of a tribunal adjudicating on a question of foreign law is to receive and consider all the evidence as to it which is available, and *bonâ fide* to determine on that, as well as it can, what the foreign law is. If from the imperfect evidence produced before it, or its misapprehension of the

¹ This statement of facts is condensed from that of the Reporter. — Ed.

² Part of this advisory opinion is omitted. KEATING, J., delivered an advisory opinion concurring in result. — Ed.

effect of that evidence, a mistake is made, it is much to be lamented, but the tribunal is free from blame.

We think that some points are clear. When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties, and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. All proceedings in the courts of common law in England are of this nature, and it is every day's experience that where the sheriff, under a *fiery facias* against A., has sold a particular chattel, B. may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff. And if this may be done in the courts of the country in which the judgment was pronounced, it follows of course that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different.

It is not essential that there should be an actual adjudication on the status of the thing. Our Courts of Admiralty, when property is attached and in their hands, on a proper case being shown that it is perishable, order that it shall be sold and the proceeds paid into court to abide the event of the litigation. It is almost essential to justice that such a power should exist in every case where property, at all events perishable property, is detained.

In a recent case of *Stringer v. English and Scottish Marine Insurance Company*, in the Queen's Bench, Law Rep. 4 Q. B. 676, it appeared that the American Prize Court, *pendente lite*, ordered a valuable cargo, which was claimed as prize, to be sold, and that not only without any adjudication that it was a prize, but although the decision of the court below had been against the captors, and that decision was ultimately affirmed on appeal. We apprehend that it is clear that in all such cases courts sitting under the same authority must recognize the title of the purchaser as valid. In Story on the Conflict of Laws, § 592, it is said that the principle that the judgment is conclusive "is applied to all proceedings *in rem* as to movable property within the jurisdiction of the court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign

tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such courts have a rightful jurisdiction founded in the actual or constructive possession of the subject-matter."

We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from Story. We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world. . . .

LORD HATHERLEY, Lord Chancellor.¹ The question which really arises before us is this, whether or not the judgment of the French court, and the consequent sale had in pursuance of that judgment, must be treated as having changed the property of the ship. The ship was bought at that auction by a person who was a British subject, and who came here and registered himself as the owner of the vessel, and is now represented by the defendant. The question is, as to the property of the ship as between Castrique and the defendant.

We have been assisted with the opinions of the learned judges in this case, and I entirely concur in the conclusion at which they have arrived. It appears to me, in the first place, desirable to consider whether this judgment must be taken as a judgment by the French court *in rem*, or whether it is to be taken as a judgment purporting only to deal with the interest in the vessel, whatever that interest might be, of Benson, who was the debtor in the action on the bill, and as giving no further or other right than such interest as Benson had. As it was stated by the learned judges, we are familiar in our law with that distinction; we are familiar with the course taken by the Court of Admiralty in proceedings against a ship, selling a ship, and giving a title against all third persons who become purchasers under a decree of that court; we are familiar also with the course taken by our own courts of law in decreeing judgment of any property of a debtor taken by levy upon his goods, in which case the interest of the debtor in the chattel is sold, and that interest alone, and no further or other right than that possessed by the debtor, can be transferred to persons purchasing under that sale. In other words, they purchase simply the interest of the debtor in that chattel.

¹ Part of this opinion, and the concurring opinions of Lords CHELMSFORD and COLONSAY, are omitted.—ED.

If we look at the course of proceedings to see what were the intent and purpose and duty of the French courts, and if we ask did they proceed in this course which they took in directing the sale of the vessel as against the vessel itself, we find that there has been a difference of opinion upon that point between the Court of Common Pleas and the Court of Exchequer Chamber. The Court of Common Pleas thought that it was not a proceeding against the ship itself, but simply against such interest as the debtor had therein, while the Court of Exchequer Chamber came to the conclusion that it was a proceeding against the ship itself. Now, I entirely concur in the remarks of the learned judges who have assisted us in this case, that, unfortunately, the case being one of foreign law, which we must consider as a fact laid before us, it has not been stated in the special case, with all the clearness which would have been desirable, what that law is. But what is there stated it appears to me is sufficient to indicate upon the whole the course taken by the French courts and the grounds of their proceeding. In the first place, it was a proceeding against Benson and the ship which originated the matter. That being so, I think that it would be very difficult to say that a proceeding *in rem* was not one of the matters contemplated in the original judgment. The judgment of the Tribunal of Commerce was a judgment against Benson. He had desired not to be made personally liable, as the expression here is, in respect of this judgment, and it was given against him "by privilege upon the ship." The ship was then directed to be sold. A good deal of argument turned upon that expression, "by privilege upon the ship." The case was argued extremely ably by Mr. Matthews at your Lordships' bar. He put the case to us thus: What was meant was no more than this, that when the ship should be sold the captain, by virtue of the French law, would be a privileged creditor, and would be entitled to be paid out of the first proceeds of the sale, but that it did not necessarily follow from this circumstance that the sale was ordered to be made as against all persons having an interest in the ship. He put it in this way, that it might be treated as if the court had regarded the whole matter thus: that he, Benson, would have a certain amount of interest in the ship by virtue of such privilege as he might have, and the court might merely mean to sell all such amount of interest as Benson had, and therefore to dispose only of those rights which he possessed in priority to others, and to the amount which might be due to him as captain in respect of any claim he had in that capacity upon the ship; in other words, to sell exactly what was due to Benson as captain, and not to sell the ship, *per se*, for any other purpose whatever.

But, as was well observed by the learned judges, in the first place this privilege could only arise after the sale of the ship had taken place to give him a priority over other creditors interested in disposing of the vessel. But further than that, regard being had to the original proceeding, being a proceeding against Benson and the ship, and Ben-

son himself being excluded from any personal liability, and the judgment against him being by privilege upon the ship, it does appear to me that the word "privilege," as used here, is used much more in the sense in which it is used by Lord Tenterden in his work upon shipping, of a charge upon a vessel which the person is entitled to realize by sale, than in the sense of saying simply that amongst all the several persons who may have claims when the ship comes to be sold, Benson is to stand in a favored position. In other words, the French court intended by the proceeding taken to adjudge the sale of the vessel in order to satisfy this privilege.

But, beyond that, I think the case becomes somewhat clearer when it is carried to the Civil Tribunal, which was called upon to affirm the judgment of the Tribunal of Commerce, and give efficacy to the dealing with the ship. What course did the Civil Tribunal take? It summoned all who were supposed to be the owners of the ship. The judges of that court only knew of Claus and Claus's assignee — they did not know any of the mortgagees whose titles did not appear upon the ship's papers; at all events, they considered, if anything was said about them, that they could pay no attention to persons of whom they could have no knowledge except through the medium of the ship's papers. For what purpose did they call Claus and his assignee? For the purpose of making them liable upon the bill, not because Claus had accepted it, but only because, being interested in the thing they were about to sell, they thought it right that Claus and his assignee should be present.

Therefore, upon the whole proceeding, taking first the proceeding against Benson and the ship, next, the detainer of the vessel by the Tribunal of Commerce for the purpose of the sale being affirmed by the Superior Court, and then the Superior Court when it arrives at the question of sale or no sale, taking care to summon those whom alone it could recognize as owners, I think there can be no doubt that the judgment of the court was intended to be a judgment *in rem*, and therefore the court intended to do that which by the French law it did, namely, to transfer the ownership in the vessel.

That being so, the only remaining point is this: it is said that the French judges decided against our English law; that the effect of our law was laid before them, and that they disregarded it and determined the case contrary to what the law of this country would be. It is said that the law of the flag should have governed the decision of the French courts with reference to this vessel, and therefore, the courts having come to an erroneous conclusion, the judgment that they erroneously gave and so acted upon would not here confer a title upon those who in France undoubtedly, under that judgment, did acquire it.

Now, my Lords, without expressing any opinion (for I purposely wish to avoid doing so) with reference to a decision of my own which has been cited, in the case of *Simpson v. Fogo*, 1 Jo. & H. 18; 1 H. & M. 195, as to what might be done in the case of a court wilfully deter-

mining that it will not, according to the usual comity, recognize the law of other nations when clearly and plainly put before it, without saying anything as to what would justify the courts in our own country in hesitating to give effect to a foreign judgment if obtained by fraud or misrepresentation, it is enough for me to say upon the present occasion, that, in this case, the whole of the facts appear to have been inquired into by the French courts judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in France in deciding as they did decide. That decision confirmed the title by sale to the person who became the purchaser at the sale. According to the law of France that title could not be thereafter disputed or disturbed, the court at Rouen being the highest court having jurisdiction in the matter.

That being so, there being neither a case of refusal to attend or listen to anything that might be said to them with reference to our own law, nor to adopt that as the ground of their conclusion, and there being no case, as far as I know, of any fraudulent representation or concealment with reference to any facts in the case, and the decision having been come to and pronounced, not, as in one of the cases which was cited, in the absence of the parties, but in Castrique's own suit, where he had every opportunity of bringing forward his own case, the decision cannot be complained of as one contrary to justice through its being pronounced in the absence, from want of citation, of any of the parties interested, I therefore think we are bound to give effect to the conclusion arrived at by the French court, and to the title derived, through the medium of that conclusion, and that the court of Exchequer Chamber was right in the decision to which it came. And, therefore, I have to submit to your Lordships that the decision of the Court of Exchequer Chamber ought to be affirmed.

Judgment of Court of Exchequer Chamber affirmed.

THE CITY OF MECCA.

COURT OF APPEAL. 1881.

[Reported 6 Probate Division, 106.]

In the early part of January, 1875, a collision took place off the Portuguese coast between the British ship "City of Mecca" and a Portuguese ship called the "Isulano," on which an action was brought in the Portuguese court. Subsequently, in the year 1879, an action was brought in the Admiralty Court in England, on which this present appeal has been commenced, and when the writ was issued it was indorsed as a claim upon a judgment of the Tribunal of Commerce of Lisbon, and the plaintiffs claimed £25,000. That judgment of the Tribunal of Com-

merce at Lisbon was a judgment pronounced on the 17th of December, 1876, which condemned the defendants the owners of the "City of Mecca" jointly and severally to pay to the plaintiffs the amount claimed with interest.¹

JESSEL, M.R. By the law of Portugal there is no such thing as an action *in rem* — it does not exist at all. What the reason may be is immaterial to inquire, and the reason given is certainly a very odd one, but the fact is quite plain. This is what is said by a gentleman of great eminence in Portugal — a Portuguese advocate and president of the Association of Advocates in Lisbon, and he has practised as an advocate since 1840, and he says, "That modern Portuguese law does not accept in terms the distinction of actions *in rem* and *in personam*, because Portuguese laws deal little in doctrine." Whether that reason is satisfactory to his mind or not, I do not know. I am afraid it is not satisfactory to mine. That being so, the course of procedure seems to be this: They bring a personal action against the owners and the captain who are liable for the collision, and when they have got judgment in that action, if the owners and captain do not pay, and if the vessel after the judgment comes within the jurisdiction of the Portuguese court, they enforce their personal judgment as against the vessel under the doctrine of the law of nations, which is stated by the two advocates who have made affidavits to be part of the law of Portugal, that damage arising from collision gives a maritime lien on the vessel which is in fault, and that the lien dates from the time of collision, and of course is not created by the judgment, which merely ascertains the amount of the damage and also decides, if that is disputed, whether there is any lien at all, whether there is any fault or liability on the part of the vessel. That being so, the judgment in this case was given actually against the captain and owners by name and there is no other judgment, and the present action is brought on that judgment and on that judgment only. There was in reality in Portugal an attempt to seize the vessel by arrest, which attempt failed, because, as I have already said, the Portuguese law does not allow the arrest of a vessel before the damage is ascertained, and therefore the embargo, as it is called, was discharged and there was no arrest of the vessel, nor does it appear that it has since come within the jurisdiction of the court of Portugal, nor is there any maritime lien or order directing a charge on the vessel or directing the sale of the vessel.

It appears to us clear that this judgment is a personal judgment in a personal action. Then it may be said, What is there to argue? The argument presented to us by the respondents is this — First of all it is alleged that the action in Portugal was an action for enforcing a maritime lien; secondly, that whatever the terms of the judgment might be, it was a judgment for enforcing a maritime lien and a judgment *in*

¹ This statement of facts is from the opinion of BAGGALLAY, L.J. Part of the opinion of JESSEL, M.R., and the concurring opinions, of BAGGALLAY, L.J., and LUSH, J., are omitted. — Ed.

rem, and that being so, it was a judgment binding the vessel in the courts of every civilized country under the international law. But I find the simple answer is that it is not an action or proceeding to enforce a maritime lien — nothing of the kind appears on the proceedings. There is no suggestion from beginning to end that the ship is liable; there is no declaration that the ship is liable, and it does not appear on the proceedings that the ship was even within the jurisdiction at the time the action was commenced against the owners. An action for enforcing a maritime lien may no doubt be commenced without an actual arrest of the ship, but there is no suggestion that they intended anything of the kind, and, in fact, the law does not allow it. An action against a ship, as it is called, is not allowed by the law of Portugal. You may in England and in most countries proceed against the ship. The writ may be issued against the owner of such a ship, and the owner may never appear, and you get your judgment against the ship without a single person being named from beginning to end. That is an action *in rem*, and it is perfectly well understood that the judgment is against the ship. In the present case the judgment does not affect the ship at all, unless the ship should afterwards come within the jurisdiction of the Portuguese court, and then it can be made a proceeding by which you can afterwards arrest the ship and get it condemned. Therefore, it seems to me to be plain that this is a personal action as distinguished from an action, *in rem*, and it is nothing more or less; and any attempt to make it out something else (because the law of Portugal does not allow actions *in rem*) is really to change the real nature of the action to meet the exigencies of those who want to make the judgment of the court of Portugal go further than it really does. It appears to me, therefore, we have not now the same state of circumstances as that on which the judge in the court below decided, for there was no action, or *in rem*, judgment *in rem*, either in form or substance.

MINNA CRAIG STEAMSHIP CO. v. CHARTERED
MERCANTILE BANK OF INDIA.

COURT OF APPEAL. 1897.

[Reported [1897] 1 *Queen's Bench*, 460.]

LORD ESHER, M.R. In this case the liquidator of the plaintiff company, which is being wound up, has in the name of the company brought an action against the defendants for money had and received — that is to say, an action in which it is asserted that the defendants have in their hands money which, in law or in equity, they ought to pay over to the plaintiffs. The facts are as follows. The company

were the owners of a ship. The ship being at Bombay loading cargo for a voyage to Hamburg, the captain by fraudulent representations was induced to do that which according to English law he had no authority as against the owners to do — namely, to sign bills of lading for goods which were not on board the ship. If proceedings had been taken in this country, the shipowners would not have been bound by the signature of such bills of lading by the captain. The defendants became holders for value of the bills of lading. Upon the arrival of the ship at Hamburg a suit was commenced by the defendants in the German court there, and the first question which arises was whether this suit was an action *in rem* or not. It is contended for the plaintiffs that it was not. There is no doubt that it was commenced in the manner appropriate to a proceeding *in rem* — namely, by arrest of the ship. After the arrest the proceedings were continued, and, upon its being shown that the captain had signed the bills of lading of which the defendants were the holders, it was held by the German court that, that being so, the owners of the ship could not deny that the goods had been shipped on board, and there was therefore no answer to the claim of the defendants in respect of the non-delivery of the goods. Thereupon the court, proceeding in the manner appropriate to an action *in rem*, condemned the ship; and, the ship having been sold, the proceeds of the sale were paid into court; and the court subsequently ordered the sum of £10,944 to be paid to the defendants out of the money in court in satisfaction of their claim. Every step in the proceedings so taken in the German court appears to me to have been in accordance with the procedure in an action *in rem*, and not in accordance with the procedure in an action *in personam*. I therefore think it obvious that the German court, in what they did, assumed to be acting *in rem*. It was urged that such a non-delivery of cargo as was complained of in this case does not confer a maritime lien according to the international rules of law with regard to maritime lien; but the court at Hamburg held that, by virtue of a statute governing the matter in their country, they had power to proceed *in rem* against the ship; and they accordingly did so, and their decision was upheld by two courts of appeal in Germany. That being so, the rule is, that as a matter of international comity, no court in this country can say that the German court had no jurisdiction to decide as they did. It was suggested that the German statute did not authorize the court to do what they did; but it was clearly for that court to construe the statute of their own country and decide accordingly; and we are therefore bound to hold that the ship was rightly condemned in an action *in rem* as if there had been a maritime lien. What then is the result of such a proceeding? When the decision is given it relates back to the time when the cause of condemnation came into existence. It was suggested for the defendants that in this case it was in existence when the ship left Bombay. I do not myself accept that view. I think that it arose when, the ship having arrived at the port of destination, she

ought to have made delivery of the goods. But, when the ship is condemned by a court having jurisdiction to condemn her *in rem*, by that condemnation the property in the ship is taken out of the former owners, and she becomes the ship of the claimants in the proceedings *in rem* to the extent of their claim. They of course have not the possession of the ship, and cannot sell the ship or transfer her when sold. She is in the hands of the court, which orders her sale and gives title to the purchaser, and, when the sale has taken place, the purchase-money is paid into court. The court, treating the money so paid in as representing the ship, orders it, or so much of it as may be necessary to satisfy their claim, to be paid out to the claimants. So in the present case the money which was the proceeds of the sale of the ship was paid into court for the court to deal with, and the court ordered it to be paid to the defendants. It was said on behalf of the plaintiffs that, before the cause of condemnation of the ship arose — that is to say, before the arrival of the ship at Hamburg — an order was made for the winding-up of the plaintiff company; and that the ship was therefore an asset of the company, and the liquidator was entitled to her as a trustee for the benefit of the creditors of the company; and that the defendants, who were only one set of creditors among others, were trustees of the money which they as such creditors had obtained by the judgment of the German court for the whole body of creditors. If the judgment of the German court had not been a judgment *in rem*, this might perhaps have been so, but I think that, the ship having been seized and condemned in a proceeding *in rem* at the suit of the defendants, even although the cause of condemnation did not arise till after the liquidation commenced, nevertheless by reason of her condemnation the ship ceased to be an asset of the company. The present defendants did not in my opinion obtain the money which was paid to them out of the proceeds of the ship by order of the German court as creditors of the company. They obtained it for themselves in their own personal right as persons to whom it was given by the decree of the German court acting *in rem* in a proceeding against the ship. By the judgment of that court the ship was declared to have been to the extent of their claim their property. They received the money which was paid to them by order of the German court, not as creditors of the company, but as being persons declared by the decree of the court to have a lien on the ship, and to be therefore interested in the proceeds of her sale to the extent of that lien. I am of opinion that under these circumstances the defendants cannot either in law or in equity be considered to hold this money as trustees for the liquidator of the plaintiff company. For these reasons I think the appeal must be dismissed.¹

¹ LOPES and CHITTY, L.JJ., delivered concurring opinions. — ED.

CHAPTER XVI.

OBLIGATIONS.

SECTION I.

PENAL OBLIGATIONS.

GRAHAM v. MONSERGH.

SUPREME COURT, VERMONT. 1850.

[*Reported 22 Vermont, 543.*]

REDFIELD, J. This is a complaint and proceeding under the statute in regard to bastards and bastardy. The important facts, admitted on the record, are, that the child, which is confessedly not legitimate, was begotten and born out of the State, and the parties never resided in the State, the mother only being temporarily here at the time the proceedings were instituted. The child resided, or was in the keeping of a family which resided, in Derby in this State, at the time of the trial.

The court are well agreed, that a proceeding for the purpose of affiliating a bastard child and compelling aid from the father in its support is, in its nature, confined to causes of action accruing within the State. The remedy is a peculiar one, and given and regulated exclusively by statute, and has no fair or reasonable application to causes of action accruing out of the State. And if we allow a case which accrued in a neighboring State or province to be brought into our courts, we could not exclude such a case coming from Japan or farther India or Kamschatka. Or, if we admit such cases to come into our courts from countries where similar laws exist, we must, equally, from countries where no such laws exist, and, for aught we can perceive, from those countries where polygamy is allowed to the fullest extent. We should thus be liable to become engaged in a species of knight errantry, in a ludicrous attempt to redress the wrongs and regulate the police of other countries, in matters which very little concern us. The truth is, the proceeding is altogether a matter of internal police, and in its very nature as exclusively local as is the administration of criminal justice.

It is not necessary here to consider how far the case of a woman, *bona fide* coming into this State to reside before the birth of the child, might merit a different consideration. It is supposable, too, that, should the birth of such a child occur during the temporary absence of the mother from the State, with the continuance of the *animus revertendi*, she might, on her return to the State, be entitled to proceed against the father, under these statutes.

Judgment reversed and suit dismissed.

DE BRIMONT v. PENNIMAN.

CIRCUIT COURT OF THE UNITED STATES, SO. DIST. NEW YORK. 1873.

[Reported 10 Blatchford, 436.]

WOODRUFF, J. This is an action of debt. The declaration contains two counts. The first is founded on an alleged judgment or decree pronounced in the then Empire of France; the other count is debt on simple contract, for interest alleged to be due to the plaintiff, for the forbearance of moneys due and owing by the defendants to the plaintiff. The first count only is demurred to. That count alleges, that the plaintiff is an alien and a citizen of the French Republic, and that the defendants are citizens of the United States and of the State of New York; that, on the 16th of March, 1868, at Paris, in the then Empire of France, the plaintiff intermarried with the daughter of the defendants; that a child of the marriage was born, who is still living; and that, on the 7th of February, 1869, such daughter, (the wife of the plaintiff,) died. The declaration then sets out certain articles of the Code Civil of France, which provide that children must make an allowance to their father and mother, and other ancestors, who are in need; that sons-in-law and daughters-in-law must, also, in like circumstances, make an allowance to their fathers-in-law and mothers-in-law, but this obligation ceases, first, when the mother-in-law contracts a new marriage, and second, when that one of the married couple through whom the relation of affinity exists is dead and the children born of such couple are also dead; that the obligations springing from the foregoing provisions are reciprocal; and that an allowance is only to be granted in proportion to the necessities of him who claims, and to the means of him who is bound to pay. It is next averred, that, at and prior to the said intermarriage, and at the time of the rendition of the judgment and decree next mentioned, and subsequently to such decree, the defendants were residents of the Empire of France, had the benefit of its laws, and owed to it a temporary allegiance; that, on the 14th of August, 1869, the Civil Tribunal, (particularly mentioned,) at Paris, rendered and pronounced judgment, in an action there pending, wherein the said plaintiff was plaintiff and the said defendants were defendants,

brought by the plaintiff, to obtain an allowance from the defendants, under the said articles of the Code Civil; that the defendants, jointly and severally, pay to him 18,000 francs per year, in equal monthly payments in advance, such payments to be made from the time that such allowance was first demanded, and should be 6,000 francs for the use of said plaintiff, and 12,000 francs for the use of the said child of the plaintiff and of said daughter of the defendants; that the defendants were both duly served with process in said action and appeared therein; that the said Civil Tribunal was a court of the Empire of France, and had jurisdiction of the subject-matter of the action and of the parties; that the defendants appealed from the said judgment to the Court Imperial of Paris; that such appeal was there prosecuted by the plaintiff and the defendants, and, on the 5th of May, 1870, such appellate court adjudged and decreed, that the before-mentioned judgment be affirmed in respect of the right of the plaintiff to an allowance, and in respect of the amount, to wit, 18,000 francs per year, and of the appropriation thereof by the plaintiff, to wit, 6,000 francs to the use of the plaintiff and 12,000 thereof to the use of the said child, and in respect of the times and manner in which it should be paid to the plaintiff, to wit, in equal monthly payments, in advance, and did adjudge and decree, that the defendants, jointly and severally, pay to the plaintiff the said sum, and pay the same from the day of the decease of their said daughter, February 7, 1869, as appears, etc., by the records and proceedings of said court, now remaining of record; that the said judgment and decree of the Court Imperial is final and conclusive, and is in full force, not reversed or annulled or satisfied, etc.; that such court is a court of general jurisdiction, and had jurisdiction of the subject-matter and of the parties; and that the plaintiff has not yet obtained satisfaction of the said judgment, whereby an action hath accrued to him to have and demand of the defendants, jointly and severally, the sum of \$10,200, being the value, in currency of the United States, of the sum of 48,000 francs, in which said last-mentioned sum the defendants are, jointly and severally, indebted to the plaintiff, by reason of the said judgment, for the time beginning the 7th of February, 1869, and ending the 7th of November, 1871.

The defendant James F. Penniman demurs to this count, upon various grounds, which I do not think it necessary to enumerate. They were urged on the argument, and, by not noticing many of them further, I am not to be deemed to affirm the sufficiency of the declaration in respect thereto. It is sufficient that the principal question is decided. That question is, whether an action of debt will lie in this court, upon such a decree of a court in France, made against citizens of the United States, husband and wife, temporarily resident in that Empire?

It may not be irrelevant to state, that, besides the articles of the French Code inserted in the declaration, the counsel for the plaintiff admitted, on the argument, and he has stated on his brief, that it is

provided, by other articles of that Code, that the duty to make the allowance which the decree in question provides, ceases whenever the claimant obtains a fortune sufficient for his own support, or the party by whom the payment is to be made becomes unable to pay, or cannot pay without withdrawing means which are required for his own necessities.

The question is novel. No case has been cited by counsel in which a foreign judgment of such a nature has been the subject of an action in this country or in England; and no such case has fallen under my observation. Cases are numerous in which foreign judgments for the recovery of a definite sum of money have been sued upon; and the question has been largely discussed, whether such judgments are conclusive, or are merely *prima facie*, evidence of the debt which they award, and whether, and to what extent, the subject-matter is open to inquiry and proofs, on the original merits. Those cases are not controverted by the counsel for the defendant, but they are deemed not to apply to such a decree as is set out in this declaration. Cases are also numerous in which the force and effect of judgments and decrees in the courts of one of the States of the United States are under consideration in the courts of other of the States, or in the federal courts. Those cases are not deemed to apply to the present, because the Constitution of the United States operates, as between the States, to give them an efficiency not due to a foreign judgment or decree.

In determining the precise question, whether, upon the facts stated in the declaration, the plaintiff shows a cause of action, it may not be material to decide whether such a judgment is, in this court, to be regarded as conclusive, or only *prima facie*, evidence of the indebtedness claimed by the plaintiff; for, if it be either, then, in connection with the allegations showing the law and the relationship of the parties, a demurrer founded in denial of legal liability could not, probably, be sustained. The cases, therefore, which discuss that distinction need not be considered.

The broad question, whether a citizen of the United States, whose daughter marries in France, can be prosecuted here upon a decree of a French court, requiring him and his wife to pay an annuity for the support of their son-in-law, is prior to the inquiry last above referred to. The subject pertains to the domestic relations of our own citizens, and the duties and obligations resulting therefrom; and the decree in question proceeds upon the declaration of an obligation not in conformity with our laws, not known to the common law, and upon the continuance of the obligation itself after the relationship out of which it is deemed to have arisen has ceased by the death of the person through whom the affinity was traced. The nearest analogy to a decree of the nature in question, to which my attention is called, is a decree for alimony, where a divorce, total or partial, has been granted; but the only cases in which such a decree has been held to support an action in another jurisdiction are under the influence of the Constitution of the

United States, and, by force of that Constitution, it was held that a suit would lie, in a Court of Chancery, to compel the performance of the decree. *Barber v. Barber*, 21 How. 582.

It is not irrelevant to a consideration of the nature of the decree in question, to say, that it does not proceed upon the rule of obligation recognized by all civilized nations, that the parent shall support his children during minority, which involves, also, the correlative right to the services of those children while thus supported. Such an obligation has no relation to the case under consideration. Whatever obligation or duty lies at the foundation of the claim of this plaintiff is the creature of positive statute, framed for the people of France, to regulate their domestic concerns, protect the public, and guard against pauperism and its evils. Statutes in some respects similar are found in England, and in most, if not all of the States of this country. The duty of parents and grandparents, and, reciprocally, of children and grandchildren when of sufficient ability, to provide for the necessary support of those relatives, and prevent their becoming a charge to the public, is declared and is enforced. Such regulations are local in their nature and in their application, and so are the orders for their enforcement. They are a part of a local system, to provide for paupers, and to relieve the public from their maintenance, when they have relatives within certain designated degrees, who are of ability to support them. Such orders are subject to modification and adjustment, as circumstances may require, in the States and tribunals wherein they are made. Apart from questions growing out of the Federal Constitution, they can only be enforced in the States where they are made. Orders of filiation are of a similar character. They are mainly for the protection of the public, founded on local statutes, and are in the nature of domestic police regulations. The provisions of the Code of France, set out in the declaration, and the decree of the courts founded thereon, are of the like nature. It would seem, that the policy of that country, as viewed by its courts, does not require that the son-in-law or other claimant shall himself do anything for his own support, but that he is to be supported in idleness. That is probably not a matter of importance to the present inquiry, except so far as it may tend to show that the judgment or decree is hostile to the policy of this country, and in conflict with the only ground upon which orders arbitrarily imposing upon one the burden of supporting another would be tolerated. The principle upon which foreign judgments receive any recognition in our courts is one of comity. It does not require, but rather forbids it, when such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens. The courts of this country will be slow to hold that, whenever an American citizen shall visit France, and reside there temporarily with his family, his son or his daughter, by a rash or imprudent marriage, can cast upon the parents, mother as well as father, the perpetual burden of an annuity for the support of the wife or

husband. So long as such residence continues, no doubt, the parents must submit to the laws of France. The orders of her courts may be enforced against them, as those laws may prescribe; but, in a matter of this kind, those laws must be executed there, and such decrees can have, and ought to have, no extraterritorial significance. They rest upon no principles of universal acceptation, like the obligation of contracts, or the protection of generally recognized, private, personal rights. No disposition to deal with foreign judgments, so as to promote the ends of justice, demands that such decrees should be arbitrarily enforced in our courts.

Beyond these considerations, I think it plain, upon the face of the declaration, and, especially where the other admitted provisions of the French Code (stated by the counsel) are brought into view, that the decree itself should be deemed, and would, in France itself, be deemed, local and provisional, and designed to be carried into effect there, and only upon persons and property found there. Their laws contemplate the supervisory control and direction of their courts over the parties, in all the changes which may occur in their relative pecuniary conditions. The decree in question prescribes a temporary rule of allowance and provision for support, subject to modification according to circumstances. There is no award of any sum certain, to be presently paid, and the declaration does not show that any sum whatever could even there be collected, without a further application to the court, for some process or other award of means by which some definite amount shall be collected. Continuing necessity, on the one hand, and continuing ability, on the other, are assumed for the future, and the absence of either makes even the decreed allowance to cease. Without assuming to say that the father-in-law and mother-in-law, if still in France, would not have the *onus* of showing that circumstances had changed, and of procuring a modification of the decree thereupon, these observations bear pertinently on the nature of the decree itself, and with great force on the question how such decree is to be treated in our own courts.

In harmony with what has been already suggested, I add, that we cannot hold that such decree is final, operative, and binding unless and until the defendants go to France and there appeal to the discretion of their courts to modify the decree according to the new circumstances which may arise; and yet, the claim here made, in regard to the effect of the decree in our courts, would require us to give judgment in accordance therewith, even though the defendants offered to prove, and could prove, that the plaintiff had come to a princely inheritance.

Without, therefore, considering the other alleged imperfections in the declaration, or the peculiarity of a decree which charges the wife of the demurrant personally, or the want of any averment that she has any separate estate which can be charged by this court, I am of opinion, that the defendant James F. Penniman is entitled to judgment upon his demurrer.¹

¹ But see *Indiana v. Helmer*, 21 Ia. 370. — ED.

BLAINE v. CURTIS.

SUPREME COURT OF VERMONT. 1887.

[Reported 59 Vermont, 120.]

WALKER, J. The case comes before us upon general demurrer to the declaration; and the only question to be decided is whether the forfeiture imposed by the laws of New Hampshire upon a person receiving interest at a higher rate than six per cent may be enforced by an action of debt, in favor of the person aggrieved, in this State.

The provisions of the statute, which are substantially set out in the declaration, are as follows:—

“If any person, upon any contract, receives interest at a higher rate than six per cent, he shall forfeit three times the sum so received in excess of said six per cent to the person aggrieved, who will sue therefor.”

It is alleged in substance, in the declaration, that the defendant, at Piermont, in the State of New Hampshire, received upon a promissory note for the sum of fifteen hundred dollars then held by the defendant and owing by the plaintiff to her, thirty dollars interest in excess of six per cent from the plaintiff on the 1st day of May in each year for six years, beginning with May, 1876, and ending with May, 1882, making one hundred and eighty dollars thus received by the defendant of the plaintiff in excess of six per cent interest during the years named; it is also alleged that by virtue of the statute of New Hampshire aforesaid, an action hath accrued to the plaintiff to recover of the defendant three times the excess of six per cent interest so paid.

The case stated comes within the statute declared upon; and if the suit had been instituted in New Hampshire, there could be no doubt of the right of the plaintiff to recover, if the action is not barred in that State by the statute of limitations.

The question here is, can the liability imposed by the statute be enforced out of the limits of New Hampshire? This must depend on the nature of the liability and the manner in which it is created. It is not a responsibility *ex contractu*. And the question arises, is it a liability imposed by the statute upon a person receiving illegal interest for a violation of its provisions and penal in its nature, or is it a statute declaratory of the common law right and a means or way enacted for enforcing it, and therefore remedial in its nature?

If it only gave a remedy for an injury against the person by whom it is committed to the person injured, and limited the recovery to the mere amount of loss sustained, or to cumulative damages as compensation for the injury sustained, it would fall within the class of remedial statutes. 1 Bl. Com. 86; 1 B. & P., N. R. 179–180; 2 T. R. 154 and 155 note; 3 Saund. 376 note, 7; 1 Salk. 206; Boice v. Gibbons, 8 N. J. L. 324; Burnett v. Ward, 42 Vt. 80. But this statute does

not limit the recovery to the mere amount of the loss sustained, or to cumulative damages as compensation; it goes beyond and inflicts a punishment upon the offender. It makes the taking of illegal interest an offence, and prescribes a penalty of three times the amount of illegal interest taken. The right of action under it does not arise out of any privity existing between the person paying and the person receiving the illegal interest, but is derived entirely from the statute. The action given is not to recover back money that the person receiving had no lawful right to take and hold against the person paying it, but one to recover a penalty for a breach of a statute law, and founded entirely upon the statute imposing the forfeiture. It was held in *Hubbel v. Gale*, 3 Vt. 266, that whatever may be the form of the action, if it is founded entirely upon a statute, and the object of it is to recover a penalty or forfeiture, it is a penal action. We think the liability created by the statute declared upon is clearly a statutory one imposed upon the person receiving illegal interest as a wrong-doer, and penal in its nature. This view is supported by the decisions of many courts of last resort, some of which have been cited in the argument. We refer, however, only to a decision of the Supreme Court of the United States in a case analogous to the case at bar. The provisions of the act in question are similar to the provisions of the National Currency Act of Congress, approved June 3, 1864, which provides that if unlawful interest is received by any banking association created by it, the person or persons paying the same, or their legal representatives, may recover back in an action of debt twice the amount of interest thus paid from the association taking or receiving the same. This provision of the Currency Act referred to came up for consideration by the Supreme Court of the United States in the case of *Barnet v. Nat. Bank*, 98 U. S. 555, where the plaintiff in error sought to avail himself of the benefit of the act in his defence by way of offset and counterclaim to the bill of exchange on which the suit was brought. Justice Swayne, in delivering the opinion of the court, denied the relief sought, and said: "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved, or his legal representative, must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress. The suit must be brought especially to recover the penalty where the sole question is the guilt or innocence of the accused."

This statute has been repeatedly under consideration by the Supreme Court of the State of New Hampshire, and has been by that court invariably treated as a penal statute. *Harper v. Bowman*, 3 N. H. 489, was an action to recover a forfeiture of three times the illegal interest paid. It was objected that some part of the penalty was barred by the statute of limitations; and the court, in considering the question, held, that the act limiting suits on penal statutes, which provides that actions upon any penal statute shall be brought within

one year from the time of committing the offence, was controlling in the decision of the question raised.

In *Kempton v. Savings Institution*, 53 N. H. 581, the court treated the statute as a penal one in an able opinion upon its construction and rules of pleading applicable to actions brought upon it.

This construction which has been given to the statute by the Supreme Court of the State in which it was enacted treating and holding it a penal statute, should be followed, and is controlling in courts of this State. *Hunt v. Hunt*, 72 N. Y. 217; *Leonard v. Steam Navigation Co.*, 84 N. Y. 48.

It is well settled that no State will enforce penalties imposed by the laws of another State. Such laws are universally considered as having no extraterritorial operation or effect, whether the penalty be to the public or to persons. They are strictly local and effect nothing more than they can reach within the limits of the State in which they were enacted. They cannot be enforced in the courts of another State either by force of the statute or upon the principles of State comity. Story on Conf. Laws, §§ 620-621; Rorer on Int. State Law, 148 and 165; *Ogden v. Folliot*, 3 T. R. 733; *Scoville v. Canfield*, 14 Johns. 338; *First Nat. Bank of Plymouth v. Price*, 33 Md. 487; *Derrickson v. Smith*, 27 N. J. L. 166; *Barnes v. Whitaker*, 22 Ill. 606; *Sherman v. Gassett*, 9 Ill. 521; *Henry v. Sargeant*, 13 N. H. 321; *Slack v. Gibbs*, 14 Vt. 357.

Actions for the recovery of a penalty or forfeiture given by laws of one State upon usurious contracts made and entered into in such State will not lie in another State. Such laws are held to be penal in their nature, and governed by the general rule that they have no extraterritorial force, and can be enforced only by the courts of the State in which they are enacted. Rorer on Int. State Law 165; *Barnes v. Whitaker*, 22 Ill. 606; *Sherman v. Gassett*, 9 Ill. 521.

The judgment of the county court sustaining the demurrer and adjudging the declaration insufficient was correct, and is affirmed.

TAYLOR v. WESTERN UNION TELEGRAPH CO.

SUPREME COURT, IOWA. 1895.

[Reported 95 Iowa, 740.]

THIS is an action to recover damages by reason of the delay of the defendant in transmitting a telegram from Webster, in the State of South Dakota, to Aberdeen, in the same State.

ROTHROCK, J.¹ It appears that there is a statute in force in the State of South Dakota which provides that "every person whose

¹ Only so much of the case as involves the question of penalty is given. — ED.

message is refused or postponed . . . is entitled to recover from the carrier his actual damages and \$50 in addition thereto." The court instructed the jury that, if it was found that the plaintiffs were entitled to recover, the measure of damage would be the value of the animal and the further sum of fifty dollars. The value of the animal was found to be one hundred and fifty dollars, and the general verdict was for two hundred dollars. It is claimed that the court erred in directing the jury to include the fifty dollars in the verdict. We think this position is well taken. That sum is in the nature of a statutory penalty. The message was sent from one point to another in that State, and the law is well settled that penal laws are strictly local, and cannot have any operation beyond the jurisdiction of the State where enacted. *Beach, Priv. Corp.* § 150; *State v. Helmer*, 21 Ia. 370; *Arnold v. Potter*, 22 Ia. 194; *Graham v. Monsergh*, 22 Vt. 534. In 18 Am. & Eng. Enc. Law, 272, the rule is stated as follows: "An extra-territorial effect will not be given to penal statutes, whether the penalty provided for is given to the public or to individuals; nor have the principles of interstate comity any application." Counsel for the plaintiffs do not seriously question that this is the law, and the offer is made to remit the fifty dollars in this court.¹

HUNTINGTON v. ATTRILL.

SUPREME COURT OF THE UNITED STATES. 1892.

[*Reported* 146 *United States*, 657.]

GRAY, J.² This was a bill in equity filed March 21, 1888, in the Circuit Court of Baltimore City, by Collis P. Huntington, a resident of New York, against the Equitable Gas Light Company of Baltimore, a corporation of Maryland, and against Henry Y. Attrill, his wife and three daughters, all residents of Canada, to set aside a transfer of stock in that company, made by him for their benefit and in fraud of his creditors, and to charge that stock with the payment of a judgment recovered by the plaintiff against him in the State of New York, upon his liability as a director in a New York corporation, under the statute of New York of 1875, c. 611. . . . On June 30, 1880, Attrill, as a director of the company, signed and made oath to, and caused to be recorded, as required by the law of New York, a certificate which he knew to be false, stating that the whole of the capital stock of the corporation had been paid in, whereas in truth no part had been paid in; and by making such false certificate became liable, by the law of New York, for all the debts of the company contracted before January 29, 1881, including its debt to the plaintiff. . . .

¹ See *Carnahan v. W. U. T. Co.*, 89 Ind. 526. — Ed.

² Part of the opinion is omitted. — Ed.

The bill prayed that the transfer of shares in the gas company be declared fraudulent and void, and executed for the purpose of defrauding the plaintiff out of his claim as existing creditor; that the certificates of those shares in the name of Attrill as trustee be ordered to be brought into court and cancelled; and that the shares "be decreed to be subject to the claim of this plaintiff on the judgment aforesaid," and to be sold by a trustee appointed by the court, and new certificates issued by the gas company to the purchasers; and for further relief.

One of the daughters demurred to the bill, because it showed that the plaintiff's claim was for the recovery of a penalty against Attrill arising under a statute of the State of New York, and because it did not state a case which entitled the plaintiff to any relief in a court of equity in the State of Maryland. . . .

The Circuit Court of Baltimore City overruled the demurrer. On appeal to the Court of Appeals of the State of Maryland, the order was reversed, and the bill dismissed. 70 Md. 191.

The ground most prominently brought forward and most fully discussed in the opinion of the majority of the court, delivered by Judge Bryan, was that the liability imposed by section 21 of the statute of New York upon officers of a corporation, making a false certificate of its condition, was for all its debts, without inquiring whether a creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, and without limiting the recovery to the amount of loss sustained, and was intended as a punishment for doing any of the forbidden acts, and was, therefore, in view of the decisions in that State and in Maryland, a penalty which could not be enforced in the State of Maryland; and that the judgment obtained in New York for this penalty, while it "merged the original cause of action so that a suit cannot be again maintained upon it," and "is also conclusive evidence of its existence in the form and under the circumstances stated in the pleadings," yet did not change the nature of the transaction, but, within the decision of this court in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, was in its "essential nature and real foundation" the same as the original cause of action, and therefore a suit could not be maintained upon such a judgment beyond the limits of the State in which it was rendered. pp. 193-198. . . .

A writ of error was sued out by the plaintiff and allowed by the Chief Justice of the Court of Appeals in Maryland. . . .

Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. . . .

The test whether a law is penal, in the strict and primary sense, is

whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of crimes and misdemeanors." 3 Bl. Com. 2. . . .

Upon the question what are to be considered penal laws of one country, within the international rule which forbids such laws to be enforced in any other country, so much reliance was placed by each party in argument upon the opinion of this court in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, that it will be convenient to quote from that opinion the principal propositions there affirmed:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." p. 290.

"The application of the rule of the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered." p. 291.

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." pp. 292, 293.

"The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State." p. 299. . . .

The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in *Dennick v. Railroad Co.*, 103 U. S. 11. . . .

That decision is important as establishing two points: 1st. The court considered "criminal laws," that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extraterritorially. 2d. A statute of a State, manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, might be enforced in a Circuit Court of the United States held in another State, without regard to the question whether a similar liability would have attached for a similar cause in that State. . . .

The provision of the statute of New York, now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or *quasi* criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in and a certificate of the payment made by the officers; and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security, for the payment of his debt out of the corporate property, on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country. . . .

It is true that the courts of some States, including Maryland, have declined to enforce a similar liability imposed by the statute of another State. But, in each of those cases, it appears to have been assumed to be a sufficient ground for that conclusion, that the liability was not founded in contract, but was in the nature of a penalty imposed by statute; and no reasons were given for considering the statute a penal law in the strict, primary, and international sense. *Derrickson v. Smith*, 3 Dutch. (27 N. J. Law), 166; *Halsey v. McLean*, 12 Allen, 438; *First National Bank v. Price*, 33 Md. 487.

It is also true that in *Steam Engine Co. v. Hubbard*, 101 U. S. 188, 192, Mr. Justice Clifford referred to those cases by way of argument. But in that case as well as in *Chase v. Curtis*, 113 U. S. 452, the only point adjudged was that such statutes were so far penal that they must be construed strictly; and in both cases jurisdiction was assumed by the Circuit Court of the United States, and not doubted by this court, which could hardly have been if the statute had been deemed penal within the maxim of international law. In *Flash v. Conn*, 109 U. S. 371, the liability sought to be enforced under the statute of New York was the liability of a stockholder arising upon contract; and no question was presented as to the nature of the liability of officers.

But in *Hornor v. Henning*, 93 U. S. 228, this court declined to consider a similar liability of officers of a corporation in the District of Columbia as a penalty. See also *Neal v. Moultrie*, 12 Ga. 104; *Cady v. Sanford*, 53 Vt. 632, 639, 640; *Nickerson v. Wheeler*, 118 Mass. 295, 298; *Post v. Toledo, &c. Railroad*, 144 Mass. 341, 345; *Woolverton v. Taylor*, 132 Ill. 197; *Morawetz on Corporations* (2d ed.), § 908.

The case of *Missouri Pacific Railway v. Humes*, 115 U. S. 512, on which the defendant much relied, related only to the authority of the legislature of a State to compel railroad corporations, neglecting to provide fences and cattle-guards on the lines of their roads, to pay double damages to the owners of cattle injured by reason of the neglect; and no question of the jurisdiction of the courts of another State to maintain an action for such damages was involved in the case, suggested by counsel, or in the mind of the court.

The true limits of the international rule are well stated in the decision of the Judicial Committee of the Privy Council of England, upon an appeal from Canada, in an action brought by the present plaintiff against Attrill in the Province of Ontario upon the judgment to enforce which the present suit was brought. The Canadian judges, having in evidence before them some of the cases in the Court of Appeals of New York, above referred to, as well as the testimony of a well-known lawyer of New York that such statutes were, and had been held by that court to be, strictly penal and punitive, differed in opinion upon the question whether the statute of New York was a penal law which could not be enforced in another country, as well as upon the question whether the view taken by the courts of New York should be conclusive

upon foreign courts, and finally gave judgment for the defendant. *Huntington v. Attrill*, 17 Ont. 245, and 18 Ont. App. 136.

In the Privy Council, Lord Watson, speaking for Lord Chancellor Halsbury and other judges, as well as for himself, delivered an opinion in favor of reversing the judgment below, and entering a decree for the appellant, upon the ground that the action "was not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the State of New York for punishment of an offence against their municipal law." The fact that that opinion has not been found in any series of reports readily accessible in this country, but only in 8 Times Law Reports, 341, affords special reasons for quoting some passages.

"The rule" of international law, said Lord Watson, "had its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of some one representing the public; were local in this sense, that they were only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex loci*, ought to be admitted in the courts of any other country. In its ordinary acceptation, the word 'penal' might embrace penalties for infractions of general law, which did not constitute offences against the State; it might, for many legal purposes, be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs, which was the very essence of the international rule."

After observing that, in the opinion of the Judicial Committee, the first passage above quoted from *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 290, "disclosed the proper test for ascertaining whether an action was penal within the meaning of the rule," he added: "A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the State whose law had been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies were presumably enacted in the interest and for the benefit of the community at large; and persons who violated those provisions were, in a certain sense, offenders against the State law as well as against individuals who might be injured by their misconduct. But foreign tribunals did not regard those violations of statute law as offences against the State, unless their vindication rested with the State itself or with the community which it represented. Penalties might be attached to them, but that circumstance would not bring them within the rule, except in cases where those penalties were recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter was regarded as an *actio*

popularis pursued, not in his individual interest but in the interest of the whole community."

He had already, in an earlier part of the opinion, observed: "Their lordships could not assent to the proposition that in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the statute of 1875 in the State of New York. They had to construe and apply an international rule, which was a matter of law entirely within the cognizance of the foreign court whose jurisdiction was invoked. Judicial decisions in the State where the cause of action arose were not precedents which must be followed, although the reasoning upon which they were founded must always receive careful consideration and might be conclusive. The court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced, and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case, and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal."

In this view that the question is not one of local, but of international law, we fully concur. The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.

In this country, the question of international law must be determined in the first instance by the court, State or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. *Burgess v. Seligman*, 107 U. S. 20, 33; *Texas & Pacific Railway v. Cox*, 145 U. S. 593, 605, above cited. If a suit on the original liability under the statute of one State is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court. *New York Ins. Co. v. Hendren*, 92 U. S. 286; *Roth v. Ehman*, 107 U. S. 319. But if the original liability has passed into judgment in one State, the courts of another State, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment, and if they do not, their decision, as said at the outset of this opinion, may be reviewed and reversed by this court on writ of error. The essential nature and real foundation of a cause of action, indeed, are not changed

by recovering judgment upon it. This was directly adjudged in *Wisconsin v. Pelican Ins. Co.*, above cited. The difference is only in the appellate jurisdiction of this court in the one case or in the other.

If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense. . . .

The judgment rendered by a court of the State of New York, now in question, is not impugned for any want of jurisdiction in that court. The statute under which that judgment was recovered was not, for the reasons already stated at length, a penal law in the international sense. The faith and credit, force and effect, which that judgment had by law and usage in New York, was to be conclusive evidence of a direct civil liability from the individual defendant to the individual plaintiff for a certain sum of money, and a debt of record, on which an action would lie, as on any other civil judgment *inter partes*. The Court of Appeals of Maryland, therefore, in deciding this case against the plaintiff, upon the ground that the judgment was not one which it was bound in any manner to enforce, denied to the judgment the full faith, credit, and effect to which it was entitled under the Constitution and laws of the United States.

*Judgment reversed, and case remanded to the Court of Appeals of the State of Maryland for further proceedings not inconsistent with the opinion of this court.*¹

FULLER, C. J., dissented: LAMAR and SHIRAS, JJ., did not sit.

FARR v. BRIGGS.

SUPREME COURT OF VERMONT. 1900.

[Reported 72 Vermont, 225.]

TYLER, J. Appeal from the disallowance of a claim by the commissioners upon the estate. The following are the material facts alleged in the declaration and admitted by the demurrer:—

The Vermont Investment Company was a corporation created and organized in May, 1882, under the laws of South Dakota, and having offices and places of business in that State and in Burlington, Vt., for the negotiating of loans and the sale of promissory notes and other securities.

¹ *Acc. Huntington v. Attrill*, [1893] A. C. 150. *Contra*, *First Nat. Bank v. Price*, 33 Md. 487; *Halsey v. McLean*, 12 All. 438; *Derrickson v. Smith*, 3 Dutch. 166; *Woods v. Wicks*, 7 Lea, 40. — Ed.

The statute under which the corporation was created contains the following provision:—

“The directors of corporations must not make dividends except from the surplus profit arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase their capital stock, except as especially provided by law. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen), are, in their individual and private capacity jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section.”

The capital stock issued and subscribed for was five hundred and twenty-three shares of the par value of one hundred dollars per share; yet the directors contracted debts and liabilities against the corporation largely in excess of the stock subscribed.

George C. Briggs, of Burlington, was a stockholder in the corporation, was duly constituted a director thereof and qualified and acted as such while it continued to do business. He attended its meetings, participated in its transactions, expressed no dissent to the creation of debts as aforesaid and caused none to be entered upon its records.

The corporation sold to the plaintiff in this State and guaranteed the payment of various notes to a large amount, and thereby became liable to pay the same to him at maturity if the makers failed to pay them.

The plaintiff demanded payment of the notes and obligations so purchased by him as they respectively fell due, of the makers, and upon failure of payment by them, made demand of payment of the corporation pursuant to its guaranty. The corporation became insolvent and was dissolved in December, 1893, and all its assets were exhausted, whereupon the plaintiff presented his claim against Briggs' estate upon the ground that, as one of the directors of the corporation, by virtue of the statute, Briggs became liable to pay him the amount of his debts against the corporation and that the claim survived against his estate.

The statute of South Dakota evidently was the general law of that State under which all business corporations were required to be organized. Upon the election of the directors they became subject to all its requirements and liable to the corporation and to its creditors, within that State at least, for a violation thereof. The question is

whether the statute had any extraterritorial force — whether creditors outside the limits of that State have any remedy by virtue of its provisions.

It is well settled that penal statutes will receive no recognition and are not enforceable in other States than the ones in which they were enacted. Story on Conf. Laws, §§ 620, 621; *Halsey v. McLean*, 12 Allen, 439, 90 Am. Dec. 157 and notes; *Blaine v. Curtis*, 59 Vt. 120; *Adams v. R. R. Co.*, 67 Vt. 76. The plaintiff concedes this to be the rule of law, but contends that the statute under which the present action is brought is not penal, but contractual. The defendant estate claims that the statute is strictly penal.

Statutes similar to that under which the present action is brought, making the directors of business corporations personally liable for their default in the performance of certain prescribed duties, have received much consideration by law writers and courts. In Cook on Cor., § 223, in Morawetz, § 907, and in Thompson, §§ 3052 and 4164, it is said that such statutes have generally been held to be penal. Courts of high authority have so held. In *Bank v. Price*, 33 Md. 488, a Pennsylvania statute which provided that, if any debts or liabilities should be contracted exceeding the amount of the capital stock of the corporation actually paid in, the directors and officers contracting the same should be jointly and severally liable in their individual capacity for the whole amount of the excess, and that the same might be recovered in an action of debt, was considered as imposing a penalty, and that it could only be enforced in the State which enacted it. In *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146, the same doctrine was held under the statute of another State which provided that officers of certain corporations should be personally liable for the debts of the corporation in case they neglected to file an annual report showing the financial condition of the corporation. See also *Stokes v. Stickney*, 96 N. Y. 323; *Carr v. Rischer*, 119 N. Y. 117. The same was held in *Derrickson v. Smith*, 27 N. J. L. 166; in *Diversey v. Smith*, 103 Ill. 375, 40 Am. Rep. 4; and in *Chase v. Curtis*, 113 U. S. 452.

[The learned judge here stated at length the case of *Huntington v. Attrill*, 146 U. S. 657.]

In *Neal v. Moultrie*, 12 Ga. 104, the charter of a bank provided that the total amount of the debts which the corporation should at any time owe should not exceed three times the amount of stock paid in, and made the directors liable for such excess; held, that as a right of action and recovery was given to individuals, or a particular class of individuals, the act was remedial and not penal. The court remarked that the act not only looked to the interests of the public at large, but, "it was also a measure of individual security which created rights in individual citizens."

In *Witters, Receiver, v. Foster*, Admr., 26 Fed. R. 737, cited by defendant, which was a bill of revivor, the original bill charged the interes-

tate, with other directors of a bank, with neglect of duty in not requiring a bond of the cashier, in allowing persons to become indebted to an amount exceeding one-tenth of the capital, and in reckoning assets as good as a basis of dividends, when they were worthless, etc., in violation of United States statutes. These statutes gave no remedy to the creditors or stockholders, and the court held that the ground of the orator's claim was the personal and official guilt of the intestate, for the omission of duties which, had they been performed, might have benefited the assets of the bank, and that the cause of action did not survive. The same court, Wheeler, J., in an action to enforce the personal liability of directors of a corporation under a Vermont statute, which provided that the corporation should not contract debts exceeding three-fourths the amount of its capital paid in, and made the stockholders and directors personally holden to the creditors, if the indebtedness should exceed that amount, held that the directors' liability for the debt arose out of the assent to the contract creating the debt and was that of contracting debtors, and clearly drew the distinction between such a statute and one that declared liability for some act or neglect in no way connected with the contracting of debts, as for neglect to file reports, which the court said was penal. *Field v. Haines*, 28 Fed. R. 919. See also *R. R. Co. v. Graves*, 80 Fed. R. 588, where this distinction is maintained; *Cook on Cor.*, § 1; *Thomp. on Cor.*, §§ 4168, 8525-6; *Mor. on Cor.*, § 908.

The defendant cites *Wind. Prov. Inst. v. Sprague et al.*, 43 Vt. 502, which arose under the same statute as *Field v. Haines* and to enforce a similar liability. The court used the expression that, "the creation of this additional liability seems to have been intended as a check upon the directors and stockholders in the contraction of debts, and to have been imposed, in some sort, as a penalty . . ." It also said, "to visit this penalty upon any others than those who caused the infraction of the charter would be manifestly unjust," etc. The word penalty may have been used inadvertently; it clearly was used in no other sense than that a party should make pecuniary payment for the breach of his contract.

Cady et al. v. Sanford et al., 53 Vt. 632, was a case against the defendants as directors of a corporation organized under the laws of this State, which made them personally liable for debts contracted before publishing the articles of association. The liability of the directors was treated as contractual, though the case was decided for the defendants upon the ground that their liability was only collateral to that of the company, and that no debt against the company had been established.

Blaine v. Curtis, 59 Vt. 120, was an action to recover a penalty imposed by the statute of New Hampshire for taking unlawful interest. The statute was held to be penal, but the court said: "If it only gave a remedy for an injury against the person by whom it was committed to the person injured, and limited the recovery to the mere amount of loss sustained, or to cumulative damages as compensation for the injury

sustained, it would fall within the class of remedial statutes." This is the rule laid down in *Boies v. Booth*, 2 W. Bl., "that where the damages are given wholly to the party injured, as compensation for the wrong and injury, the statute, having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is not penal, properly so called, but remedial."

It appears by the cases above referred to that it was the doctrine of this court long before *Huntington v. Attrill* was decided, that where the purpose of a statute is to furnish a remedy to creditors who have been injured by the directors' violation of the requirements of the statute, the liability of such officers is contractual, and actions upon such statutes are transitory and can be brought in any State in courts of competent jurisdiction.

Some of the decisions by courts of other States in which a different doctrine has been held have been rendered upon statutes not containing the remedy for creditors, which is expressly provided in the South Dakota statute. That statute clearly is not penal either in its letter or intent, but it grants a right of action to private persons who have suffered pecuniary injury in consequence of certain officers of corporations violating the statute, to recover damages of those officers, the extent of whose liability is the amount of pecuniary loss sustained by such private persons — creditors of the corporation. No public wrong was committed when the directors exceeded the prescribed limit in creating debts. The creditors were the only persons upon whom a wrong was committed, and they have a remedy by virtue of the *quasi* contract which the directors entered into with them when the sales of securities were made, to the effect that the directors were not exceeding the prescribed limits in creating debts. The obligation which the statute imposed upon the directors not to create debts beyond a certain limit entered into the contracts of sales of securities which the directors made through their agents. The directors created the debt in this jurisdiction, and the statute of the sister State fixes the extent of their liability, which does not arise from their personal misconduct merely irrespective of its effect upon the property rights of others, but, as was said by the court in *Field v. Haines*, *supra*, "the liability arises out of the assent to the contract creating the debt." As was said in *Wind. Prov. Inst. v. Sprague*, *supra*, in respect to directors: "They can keep the indebtedness of the company within the limits fixed by the legislature, or they can extend that indebtedness beyond that limit and voluntarily take upon themselves the relation of joint debtors to the creditors of the company." The liability is similar to that of sureties and guarantors, and evidently was imposed partly for the purpose of inducing the directors to perform their prescribed duties, and partly as a means of securing the creditors of corporations from losses occasioned by the acts of their officers.

Pro forma judgment reversed ; demurrer overruled ; declaration held sufficient ; cause remanded.

ERICKSON v. NESMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1862.

[Reported 4 Allen, 233.]

DEWEY, J. The plaintiffs set forth in their bill in equity that they are the holders of sundry promissory notes to the amount of \$19,300, of a certain corporate body known and incorporated by the name of the "Franklin Mills," duly organized under a charter obtained in New Hampshire, by which the said corporation were authorized to carry on the business of manufacturing cotton and woollen goods in the towns of Franklin and Northfield in said State; and they aver that the said notes are due and unpaid, although a demand has been made upon the corporation therefor. The bill further alleges that the defendants are personally liable for the payment of said notes, having been stockholders in said corporation when the debts were contracted, and when they became due and payable. Such personal liability is alleged to arise from certain provisions in the laws of New Hampshire, providing that the stockholders shall be jointly and severally liable for all debts and contracts of such corporation until the whole amount of the capital stock fixed by the company shall have been paid in, and a certificate thereof shall have been duly recorded in the office of the clerk of the town where such corporation has its place of business, or is situated. A further provision is also found in the same statute, making the stockholders of such corporation liable for debts of the corporation in case the company shall fail to give notice annually in the month of May, to the governor, of the amount of debts due to and from said corporation, and the value of the property and assets of said corporation. An amendment was subsequently allowed, alleging that the bill was brought in behalf of all the creditors.

The defendants filed a general demurrer.

Independently of the statute provisions, no responsibility for the payment of these notes would attach to the defendants. The legal body who alone would be held the debtor would be the corporation.

The inquiry is, whether these statute provisions of the State of New Hampshire can furnish a legal ground for the courts of Massachusetts to charge the defendants in a bill in equity with the payment of the indebtedness of the corporation upon these notes. An attempt has heretofore been made to do so in an action at law by the plaintiffs against John Nesmith, one of these defendants. The court refused to sustain such action, and by so doing necessarily held that the liability of the stockholders was not that of an ordinary contractor, on an original indebtedness, which could of course be enforced here, as well as in New Hampshire, against a resident here. Indeed, it was expressly said that "the liability on which the present action is founded is

created solely by the statute of the State of New Hampshire." *Erickson v. Nesmith*, 15 Gray, 221.

It is true, the principal ground assigned for refusing to entertain the action was that no such action was allowed to be maintained in New Hampshire against a stockholder, by those laws, a bill in equity being there required, in which, under the decision of their courts, all the stockholders must be made defendants, and, as it would seem, the suit must be brought in behalf of all the creditors. This was a sufficient reason for dismissing that action; but the court were careful not to express any opinion upon the question whether even a bill in equity could be maintained against a citizen of Massachusetts, in the courts of Massachusetts, for the purpose of charging him with the statute liability created solely by virtue of the laws of New Hampshire. The court in that case say, as to that matter, if such bill in equity will not lie, "it will be because the statute of the State which confers on them the right, has failed to provide a remedy which can be used beyond the limits of its own territory."

We have long had statutes substantially similar to those under which the defendants are sought to be charged. The construction put upon them by this court has been that the individual liability of stockholders in manufacturing corporations was one of a particular and limited character, or to be enforced only in the mode, and by the use of the particular remedy, named in the statute. Thus it was held, under St. 1808, c. 65, that the liability did not constitute a charge upon the estate of a deceased stockholder. *Child v. Coffin*, 17 Mass. 64; *Ripley v. Sampson*, 10 Pick. 370. In *Andrews v. Callender*, 13 Pick. 490, it was said by the court that "the liabilities of the individual members of the corporation are created by the statute; and it is clear that at common law the corporation only would be liable."

These cases were before the enactment of Rev. Sts. c. 38, but apply equally to the latter statute. In *Gray v. Coffin*, 9 Cush. 199, it is said that this individual liability is one depending upon the provisions of positive law, and is to be construed strictly. In *Dane v. Dane Manufacturing Co.*, 14 Gray, 488, it was held that this liability is not one that survives, and requires the executor to appear in the case, and take upon himself the defence. In *Bangs v. Lincoln*, 10 Gray, 600, it was held that the liability of a stockholder could not be the subject of an allowance as against the estate of a person in insolvency under the insolvent laws of Massachusetts, there having been no judgment against the corporation, or the necessary previous steps to fix the same as an absolute debt against the party as an individual stockholder.

In *Knowlton v. Ackley*, 8 Cush. 96, where an action of law was brought against a stockholder of a manufacturing corporation for a debt contracted by the corporation, seeking to charge such liability under the statute provision as to failure to pay in the whole capital, and recording a certificate to that effect, the court refused to sustain such action, holding that the liability, if it existed at all, was the statute

liability as a stockholder ; and that the defendant was not liable on the original contract, as the debtor for the articles furnished to the corporation.

The further inquiry is, whether a liability of this character, fixed upon the stockholders of a manufacturing corporation wholly by the statutes of New Hampshire, the mode of enforcing it, or the remedy, being found wholly in such foreign statute, can be properly enforced in this State against one or more of our citizens who may have become stockholders in such foreign corporation. When the statute confers a right and prescribes a remedy, that particular remedy and that only can be pursued. The only remedy given by the statute of New Hampshire is by a bill in equity. Such a bill, as it seems by the decision of the court of that State in *Hadley v. Russell*, 40 N. H. 109, means a bill in behalf of all the creditors, and against all the stockholders. This was so assumed in the opinion of this court in the former case between these parties. In *Knowlton v. Ackley*, this court, in denying an action at law, and suggesting the remedy by bill in equity, seem to assume that the bill will be against all the stockholders, and for the benefit of all the creditors.

If this be so, we perceive at once strong reasons why such a bill should be brought in the State which created the corporation, and where the same is located by the express terms of its charter, and where its place of business is. The effect of maintaining such a bill is to draw before the court all the creditors of the corporation, all the stockholders, and necessarily, as we should suppose, the principal debtor, the corporation itself. The fact of the residence of a single stockholder in Massachusetts, who might be liable in a New Hampshire corporation in common with a hundred stockholders residing there, would upon that hypothesis transfer to our jurisdiction all such stockholders and all the creditors, and authorize us to hear and adjust all conflicting questions as to the indebtedness of the corporation, who were stockholders, and what were the equities between them.

Great practical difficulties meet us at once. There are strong reasons for holding that, in case of an existing corporation, the debt sought to be recovered of a stockholder should be first established by a judgment of court. If this be doubtful, it is at least necessary that before such debt be established by the proceedings in the bill in equity, the corporation should have been made a party to the bill. *Bogardus v. Rosendale Manuf. Co.*, 3 Seld. 151. But we have no jurisdiction that will reach such corporation out of this commonwealth, and having no assets here, and the same is true of the stockholders residing in New Hampshire. A bill in equity in Massachusetts is therefor not the remedy intended to be prescribed by the statute of New Hampshire creating and regulating the liability of stockholders in a manufacturing corporation in New Hampshire.

It is urged on the part of the plaintiffs that great practical evil may result from thus refusing to charge a party here who is an actual stock-

holder of a corporation in New Hampshire, but who resides without its limits. To this it may be replied, that it would be a much more serious evil to hold that the whole matter of winding up the concerns of a bankrupt corporation of New Hampshire, ascertaining who are its creditors, who its stockholders, what is the amount of its assets, and how are the same to be distributed, should be transferred to the jurisdiction of Massachusetts by reason of the residence here of a single member of such corporation. There seems to be no practicable mode of dealing with such corporation and its members, when seeking to charge the latter upon their statute liability, but to proceed in the manner prescribed by the statute creating such liability, and in the local jurisdiction where the corporation was established and carries on its business, and by whose local statutes alone the liability exists.

Demurrer sustained.

B. R. Curtis & H. C. Hutchinson, (D. S. Richardson with them,) for the defendants. The liability of the stockholders depends upon the statutes of New Hampshire, and can be enforced in this State only by comity. The remedy provided in those statutes is local. *Pickering v. Fisk*, 6 Verm. 102; *Drinkwater v. Portland Marine Railway*, 18 Me. 35. The liability is peculiar, and has not the ordinary characteristics of a debt. The claim does not survive. *Dane v. Dane Manuf. Co.*, 14 Gray, 488. It is not provable in insolvency. *Kelton v. Phillips*, 3 Met. 61; *Gray v. Coffin*, 9 Cush. 192; *Bangs v. Lincoln*, 10 Gray, 600. It cannot be enforced at common law by action. *Gray v. Coffin*, 9 Cush. 192; *Knowlton v. Ackley*, 8 Cush. 93. The remedy provided is specific, and limited to the State of New Hampshire. A prior judgment against the corporation is essential to the maintenance of a bill in equity. And the corporation is a necessary party to such a bill. *Hadley v. Russell*, 40 N. H. 109; *Tibballs v. Bidwell*, 1 Gray, 399.

J. C. Dodge, for the plaintiffs. By the statutes of New Hampshire, the stockholders are jointly and severally liable for these debts. In New Hampshire this liability is treated as a contract. *Chesley v. Pierce*, 32 N. H. 388, 405; *Haynes v. Brown*, 36 N. H. 545; *Hicks v. Burns*, 38 N. H. 141. If this is so, the remedy is not necessarily confined to New Hampshire, but may be enforced wherever the stockholders reside. *Story Conf. Laws*, §§ 38, 329, 619-628; 2 Kent Com. (6th ed.), 457, 458; *Bank of Augusta v. Earle*, 13 Pet. 519. The result of these authorities is that the laws of one State or nation, except those of a penal character, may and will be enforced in other States or nations, *ex comitate*, unless contrary to their known policy, or injurious to their interests, or prejudicial to the rights of their citizens. No distinction in this respect can be traced between the statute and common law. The enforcement of this obligation is not contrary to the policy of Massachusetts. Gen. Sts. c. 60, §§ 17, 18. It is not prejudicial to a man's rights to compel him to perform his obligations. To hold that this liability cannot be enforced out of New Hampshire will

make it of little value as security to creditors. Such liability has repeatedly been enforced out of the States whose laws created the corporations. *Ex parte Van Riper*, 20 Wend. 614; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. (S. C.) 226; *Perkins v. Church*, 31 Barb. 84; *Bond v. Appleton*, 8 Mass. 472. Clearly the corporation might be sued here.¹

BANK OF NORTH AMERICA v. RINDGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[Reported 154 Massachusetts, 203.]

ALLEN, J. The plaintiff is a corporation of the State of New York. The defendant is a resident of California, who owned fifty shares of stock in the Haddam State Bank, a corporation of Kansas. The plaintiff recovered judgment in Kansas for \$5,343 and costs against the Haddam State Bank, and took out execution thereon, but could find no property of the bank whereon to levy, and so the execution was returned unsatisfied. No steps were taken in Kansas to charge the defendant as a stockholder in the bank, but, he being found in Massachusetts, the plaintiff brings this action against him here, seeking to charge him personally for the judgment against the bank to the amount of the par value of his shares therein, namely, \$5,000. This is sought to be done by virtue of the laws of Kansas, respecting which the averment in the declaration is as follows:—

“And the plaintiff further says, that by the laws of the State of Kansas, if any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, and such plaintiff may maintain an action at law against any one or more of the stockholders of such corporation to recover a debt due by the corporation.”

The declaration was demurred to, and we have to determine whether the plaintiff states a case upon his declaration.

The declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statu-

¹ *Acc. Russell v. Pac. Ry.*, 113 Cal. 258, 45 Pac. 323; *Young v. Farwell*, 139 Ill. 326, 28 N. E. 845; *Tuttle v. Nat. Bank*, 161 Ill. 497, 44 N. E. 984; *Lowry v. Inman*, 46 N. Y. 119; *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; *Finney v. Guy*, 111 Wis. 296, 87 N. W. 255; *May v. Black*, 77 Wis. 101, 45 N. W. 949. — Ed.

tory, or rest merely in judicial decisions. It is to be regretted that we are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that State. But we must take the case as the parties present it to us.

The question can hardly be considered as an open one in this Commonwealth. This court has often declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other States under statutes of those States. In *Post & Co. v. Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341, 345, it is said: "This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created." See also *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 353, and cases cited.

The case at bar furnishes a strong illustration of the propriety of this course. If the plaintiff, as a creditor of the Kansas corporation, without obtaining any previous judgment in Kansas establishing the defendant's liability as a stockholder, can maintain an action directly and in the first instance against him in Massachusetts, for the purpose of charging him as a stockholder under the qualified liability set forth in the declaration, then it would follow that the plaintiff might also institute a similar action against him in California, or in any number of other States where service upon him could be obtained. The plaintiff might also institute similar actions for the same debt in different States against other stockholders. In such case, it is probable that a judgment against one stockholder without satisfaction would be no bar to actions against others, but it is obvious that the defendants in such actions might be put to great inconvenience in ascertaining, and indeed might find it practically impossible to ascertain, what steps the plaintiff might have taken against other stockholders in other States. A dishonest creditor might possibly recover several times over against different stockholders in different States, before they respectively could ascertain the facts. Likewise, the defendant, if compelled to pay under a judgment recovered in one State, would find it difficult, if not impossible, to enforce contribution from other stockholders residing elsewhere. Moreover, if the plaintiff might maintain such actions against the defendant and against other stockholders in different States, until he should finally recover satisfaction, other creditors of the Kansas corporation might also do the same. If every creditor of a Kansas corporation, which has no property with which to respond to a judgment obtained by such creditor against it in Kansas, may thereupon, without any further proceedings in that State to charge the stockholders, maintain an action against every stockholder in every

State in the Union where service can be obtained, and pursue such action until satisfaction is obtained from some stockholder in some State, it is obvious that a large amount of litigation might ensue, under which substantial justice as among the stockholders could not be worked out. The liability of the stockholder, as set forth in the declaration, is not a general liability for all the debts of the corporation. The execution against the stockholder which can be issued in Kansas in the action against the corporation, as set forth in the declaration, is only "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." Probably, by the true construction of the laws of Kansas, the action at law to charge stockholders, which is given as an alternative remedy, would be limited to the same amount as the execution; though, according to the averment of the declaration, the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, without any other limitation being expressed. The present plaintiff does not contend that it can recover against the defendant the full amount of its judgment, but only the par value of the defendant's stock in the bank. The liability sought to be enforced is a strictly limited one. It seems to us that a *bona fide* or at any rate a compulsory payment to one creditor would discharge a stockholder to that extent from liability to others; and a payment of the full par value of his stock would, according to the view which has been expressed by this court, be a full discharge: *Halsey v. McLean*, 12 Allen, 438, 442; though as to this other courts might hold otherwise. *Fowler v. Robinson*, 31 Me. 189; *Grose v. Hilt*, 36 Me. 22. There is no averment in the declaration that the defendant has not been thus discharged from liability, and perhaps this is not necessary, as it would be more properly a matter of defence; but in case of several actions in different States, questions of priority of the claims of creditors might arise, upon which the decisions of the courts of the different States might not be uniform, and thus the defendant might be held liable more than once. The cases cited by the defendant appear to show that in some States the creditor first bringing suit has priority. *Ingalls v. Cole*, 47 Me. 530; *Thebus v. Smiley*, 110 Ill. 316. In Missouri, the creditors rank in the order in which they respectively obtained judgment. *State Savings Association v. Kellogg*, 63 Mo. 540. In other States, no priority among the creditors is recognized. *Pfohl v. Simpson*, 74 N. Y. 137; *Wright v. McCormack*, 17 Ohio St. 86; *Eames v. Doris*, 102 Ill. 350; *Chicago v. Hall*, 103 Ill. 342. See *Thompson, Liability of Stockholders*, §§ 420-426; 2 *Morawetz, Corp.* (2d. ed.), § 897. Even a compulsory payment might not avail to protect him. Moreover, the defendant might by way of set-off present claims which he holds either against the corporation in Kansas, or against the creditor who sues him, and different decisions in respect to his right of set-off might be made in different States.

These considerations are suggested to illustrate the practical diffi

culty of enforcing a liability such as that set forth in the declaration in other States than that where the corporation is established, in such a way as to secure substantial justice. This difficulty is far greater in cases where no steps have been taken in the State where the corporation is established to ascertain and determine the amount of each stockholder's liability. There the whole amount of debts can be ascertained, and the proper proportion assessed upon each stockholder; or his liability can be otherwise determined in a manner which will avoid many of the objections which exist against the maintenance of actions like the present. We remain satisfied with the conclusions heretofore reached by this court, that such an action under the circumstances which appear here ought not to be entertained in this State. Limiting our decision to the facts now before us, it is this: That a resident of the State of New York cannot maintain in the courts of this State an action against a resident of the State of California, to establish his personal liability as a stockholder of a corporation organized in the State of Kansas, and having no place of business in this State, for a debt of that corporation to the plaintiff, under laws of Kansas such as are set forth in the declaration, providing for a certain special and limited liability on the part of stockholders, when no judicial proceedings have been taken in Kansas to ascertain and establish the liability of the defendant as such stockholder.

Whether the same result might not be reached on the ground that the subsidiary liability of stockholders such as is set forth is matter of remedy only, and does not follow the stockholder outside of the State, there being no averment of a different construction of the statute by the Kansas courts, we need not consider. *Brown v. Eastern Slate Co.*, 134 Mass. 590.

*Judgment for the defendant affirmed.*¹

HANCOCK NATIONAL BANK v. ELLIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1898.

[Reported 172 *Massachusetts*, 39.]

THE plaintiff was a creditor of the Commonwealth Loan and Trust Company, a private corporation established under the laws of the State of Kansas, and had recovered judgment against the Loan and Trust Company in the Circuit Court of the United States for the District of

¹ *Acc. State Nat. Bank v. Sayward*, 86 Fed. 45; *Coffing v. Dodge*, 167 Mass. 231, 45 N. E. 928; *Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538. And see *Tuttle v. Nat. Bank*, 161 Ill. 497, 44 N. E. 984; *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419. — ED.

Kansas. Execution issued for the amount of the judgment and was returned unsatisfied. The defendant, a resident of the Commonwealth, is owner of several shares of stock in the Loan and Trust Company. The statutes of Kansas provide that a stockholder shall be liable for the debts of the corporation to an amount equal to the par value of the stock owned by him. This action was brought to enforce payment by the defendant of the debt due from the Loan and Trust Company to the plaintiff.¹

FIELD, C. J. This court has many times decided that the statutes of other States, creating the liability of stockholders to creditors of a corporation, which provide for a suit of a special kind to which the corporation and all the stockholders are to be made parties, will not in general be enforced by the courts of this State. It often happens that the courts of this State could acquire no jurisdiction over the corporation which is a necessary party, or over many of the stockholders, and the suit itself is sometimes of a kind unknown to our laws. The proper courts of the State under whose laws the corporation is established have full jurisdiction over the corporation. Whether in such a suit such courts can acquire jurisdiction over all the stockholders, wherever they reside, in order to determine their liability under the statutes to which they may be held to have assented in becoming stockholders, it is unnecessary now to consider. The proceedings are somewhat analogous to the laying of assessments ratably upon all stockholders for the purpose of paying the debts of the corporation in the manner and to the extent prescribed by the statutes. The special remedy provided by the statutes must be pursued, and, as the statutes of a State have no force *ex proprio vigore* beyond the territorial limits of the State, the remedy usually must be pursued in the State where the corporation has been established and the statutes passed. *Erickson v. Nesmith*, 15 Gray, 221; s. c. 4 Allen, 233; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349; *Post v. Toledo*, Cincinnati, & St. Louis Railroad, 144 Mass. 341; *Bank of North America v. Rindge*, 154 Mass. 203; *Coffing v. Dodge*, 167 Mass. 231. See *Fourth National Bank v. Francklyn*, 120 U. S. 747; *Lowry v. Inman*, 46 N. Y. 119; *May v. Black*, 77 Wis. 101, 107; *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114; *Nimick v. Mingo Iron Works*, 25 W. Va. 184. . . .

In *Post v. Toledo*, Cincinnati, & St. Louis Railroad, *ubi supra*, this court say: "The obligation imposed by the Statutes of Ohio upon the stockholders for the purpose of securing the payment of the debts of the corporation is *quasi ex contractu*. It must be taken that all persons who become stockholders in an Ohio corporation know the law under which the corporation is organized, and assent to the liability which that law imposes upon stockholders, and that all persons who deal with the corporation rely upon the liability of the stockholders as security for the payment of whatever debts may be due them from the corporation.

¹ This statement of facts is substituted for that contained in the opinion. Part of the opinion is omitted. — ED.

It is for the people or the legislature of each State to determine to what extent, if at all, the stockholders of corporations created by the laws of that State shall be liable for the debts of such corporations. It was early the policy of Massachusetts to make every stockholder liable to have his property taken to satisfy a judgment against a Massachusetts corporation of which he was a member ; see *Child v. Boston & Fairhaven Iron Works*, 137 Mass. 516 ; and although this policy has now been changed, and the liability restricted to specific cases, and to corporations of a particular character, yet there is nothing in the laws of Ohio, as stated in the bill, that is so opposed to the general policy of our laws that even citizens of Massachusetts, who voluntarily have become stockholders in Ohio corporations, should not be held to perform the obligations imposed by those laws."

When the liability is distinctly imposed by statute upon the stockholders severally, it would be unfortunate if it could not be enforced against stockholders not resident within the State under whose laws the corporation has been established, on the ground that due process could not be served on them within that State, and the courts of the State where they reside would not take jurisdiction of suits to enforce the liability.

It certainly concerns the due administration of justice that all stockholders, wherever they reside, should be compelled by proceedings somewhere to perform the statutory obligations toward creditors of the corporation which they have assumed by becoming stockholders.

The remedy provided by paragraphs 1200 and 1204 of the General Statutes of Kansas, even if applicable to the present case, was not intended to be exclusive when a judgment has been obtained against the corporation. The present plaintiff has pursued exactly the remedy provided by paragraph 1192 of those statutes. That paragraph permits the plaintiff to proceed by action to charge the stockholders with the amount of the judgment. The courts of Kansas hold that the action must be against the stockholders severally, and not jointly. The stockholder who pays more than his proportion of any debt of the corporation may compel contribution from the other stockholders by action. The creditor of the corporation can by action collect the amount of his judgment remaining unpaid of any stockholder, "to any extent equal to the amount of stock by him or her owned, together with any amount unpaid thereon." The stockholder is discharged as against all creditors of the corporation when he has paid the debts of the corporation to this extent. We are unable to see in what manner the enforcement of these statutes by the courts of Massachusetts against stockholders resident here, at the instance of a creditor of the corporation, does any injustice to the citizens of Massachusetts. If they pay what they are required to pay, they have the same remedy for contribution which any other stockholders have. This remedy may be difficult to enforce, because the stockholders may reside in many different States or countries ; but the same remedy for contribution is given to all stockholders wher-

ever they reside. The legislature of Kansas has chosen to give to the creditors of certain of its corporations the security which the individual liability of each stockholder affords, to the extent prescribed by its statutes, leaving the burden of enforcing contribution from other stockholders on any stockholder who has been compelled to pay anything in discharge of the debts of the corporation. This somewhat resembles the law of Massachusetts whereby judgment creditors of cities and towns can levy execution on the property of any inhabitant, and such inhabitant is left to enforce contribution from the other inhabitants. Persons becoming stockholders in foreign corporations can ascertain the nature and extent of the liability of the stockholders in such corporations according to the laws of the State or country under which the corporations are organized, and they cannot complain if this liability is enforced against them. . . .

Upon the evidence introduced at the trial, a majority of the court think that the reasonable inference is that the action given to enforce the liability of stockholders under paragraph 1192 of the General Statutes of Kansas of 1889 was intended to be a transitory action of such a nature that it might be brought in any court of general jurisdiction over similar actions in any State or country where service according to the laws of that State or country could be made upon a stockholder. . . .

*Exceptions sustained.*¹

¹ *Acc. Flash v. Conn*, 109 U. S. 371; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640 (reversing 20 R. I. 466, 40 Atl. 340); *Rhodes v. U. S. Nat. Bank*, 66 Fed. 512; *McVicar v. Jones*, 70 Fed. 754; *Whitman v. Nat. Bank*, 83 Fed. 288; *Mechanics' Sav. Bank v. Fidelity Ins. Co.*, 87 Fed. 113; *Dexter v. Edmands*, 89 Fed. 467; *Kisseberth v. Prescott*, 91 Fed. 611; *Hale v. Haddon*, 95 Fed. 747; *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023; *Bell v. Farwell*, 176 Ill. 189, 52 N. E. 346; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *First Nat. Bank v. Gustin*, 42 Minn. 327, 44 N. W. 198; *Rule v. Omega S. & G. Co.*, 64 Minn. 126, 67 N. W. 60; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Alldrich v. Anchor Coal & Development Co.*, 24 Or. 32, 32 Pac. 756; *Aultman's Appeal*, 98 Pa. 505; *Cushing v. Perot*, 175 Pa. 66, 34 Atl. 447.

A corporation or its receiver may, in a foreign State, sue a stockholder for calls on the stock. *Mandel v. Swan Land & Cattle Co.*, 154 Ill. 177, 40 N. E. 462; *Stoddard v. Lum*, 159 N. Y. 265, 53 N. E. 1108; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489. But see *New Haven H. N. Co. v. Linden Spring Co.*, 142 Mass. 349, 7 N. E. 773. So one stockholder may sue another in a foreign State for contribution. *Allen v. Fairbanks*, 45 Fed. 445. — ED.

SECTION II.

OBLIGATIONS EX DELICTO.

RICHARDSON v. NEW YORK CENTRAL RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1867.

[Reported 98 Massachusetts, 85.]

HOAR, J. The court are all of opinion that this action cannot be maintained, and that the demurrer must prevail.

There is great difficulty in ascertaining what cause of action this plaintiff has against the defendants, or how she acquired any. By the common law, and by the laws of this Commonwealth, no action could be brought against the railroad company for negligently causing the death of the plaintiff's intestate. This is conceded; and the plaintiff rests her case wholly on the statute of New York. If this be a penal statute, it cannot be enforced beyond the territory in and for which it was enacted. If it gives a new and peculiar system of remedy, by which rights of action are transferred from one person to another in a mode which the common law does not recognize, and which is not in conformity with the laws or practice of this Commonwealth, there is an equally insuperable objection to pursuing such a remedy in our courts.

The plaintiff's counsel, in their ingenious and impressive argument, being apparently fully aware of the difficulties of the case, have placed their claim to recover upon the ground that the statute of New York vested a right of property in the widow and her children at the moment of the husband's death, and designated a trustee to receive and enforce this right, whose capacity to sue will be sustained in any forum.

The right of property which the statute defines is of a very peculiar nature. In the first place, the act or default which caused the death must be such as would, if death had not ensued, have entitled the party injured to an action to recover damages in respect thereof. This the statute makes requisite to give the personal representative an action for damages, and it would thus seem that the action was designed to be for the purpose of compensating the injury to the deceased. But we next find that the compensation is not to go to the personal representative of the deceased, to be disposed of as other property or rights of property belonging to the deceased. It is not to be applied in payment of his debts, nor is it subject to the provisions of his will. It is not the injury to the deceased which is to be estimated at all. The whole amount is not to exceed five thousand dollars; and, with that limitation, the jury may give such damages as they shall deem a fair and just

compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. The damages, therefore, are to be for the pecuniary injuries to the wife and next of kin. But, when the pecuniary interests of the wife and next of kin in the death have been ascertained, the sum recovered on this basis is not to be paid over to these several parties in proportion to their respective pecuniary interests thus determined or regarded, but is to be distributed to them in the proportion provided by laws for the distribution of intestate personal property. If we take some one of the next of kin, therefore, it may follow that, because the defendants caused by negligence the death of the plaintiff's intestate, this person may recover by virtue of the statute, through the plaintiff as administratrix, a sum of money which has no relation to the extent of the injury done to the deceased; and no relation to the extent of the injury done to the person who is to receive it. If the jury should deem three thousand dollars a fair and just compensation for the pecuniary injury resulting to the wife, and one thousand dollars to one of the next of kin, and five hundred dollars to another, and should be of opinion that there was no pecuniary injury to the others of the next of kin, from the death, they would assess as damages four thousand five hundred dollars; and this the plaintiff would be bound to distribute according to the statute of distributions, which makes no reference to the pecuniary interest of the distributee in the death. In the language of Mr. Justice Denio, "these statutes have introduced a principle wholly unknown to the common law, namely, that the value of a man's life to his wife or next of kin constitutes, with a certain limitation as to amount, a part of his estate, which he leaves behind him to be administered by his personal representatives;" and "though the action can be maintained only in the cases in which it could have been brought by the deceased if he had survived, the damages nevertheless are given upon different principles, and for different causes." *Whitford v. Panama Railroad Co.*, 23 N. Y. 468.

If we understand that the limitation of the defendants' responsibility to cases in which the deceased would have had a right of action if he had survived, is not intended to make his right of action survive to his representatives, but is only meant to define and describe the cases in which the right of property and of action is recognized in the widow or next of kin, we have still the question to meet, How can that be regarded as anything else than a statute penalty, which the personal representative of the deceased is to recover by an action; which is limited in amount, although that amount may be much less than the extent of the injury sustained by those whose loss is to be estimated in computing it; and which is to be distributed among the parties entitled to receive it, not in proportion to the injuries which they have respectively sustained, but in proportion to the shares to which they would be severally entitled in the distribution of an intestate estate? We do not readily find a satisfactory answer

to this question. But a complete and decisive objection to the maintenance of the action by this plaintiff remains.

The plaintiff is the administratrix appointed under the law of Massachusetts. Her right to sue in this Commonwealth, in her representative capacity, is upon causes of action which accrued to her intestate, or which grow out of his rights of property, or those of his creditors. The remedy which the statute of New York gives to the personal representatives of the deceased, as trustees of a right of property in the widow and next of kin, is not of such a nature that it can be imparted to a Massachusetts executor or administrator, *virtute officii*, so as to give him the right to sue in our courts, and to transmit the right of action from one person to another in connection with the representation of the deceased. The only construction which the statute can receive is, that it confers certain new and peculiar powers upon the personal representative in New York. The administrator in Massachusetts is in privity with the New York administrator only to the extent which our laws recognize. A succession in the right of action, not existing by the common law, cannot be prescribed by the laws of one State to the tribunals of another. It is upon this principle that the negotiability of contracts, and whether an assignee can maintain an action in his own name, is held to be determined by the *lex fori*, and not by the *lex loci contractus*; a matter not of right, but of remedy. *McRae v. Mattoon*, 10 Pick. 49; *Warren v. Copelin*, 4 Met. 594; *Foss v. Nutting*, 14 Gray, 484, and cases cited.

For the reason, therefore, that the right of action which the New York statute gives to the personal representative of the deceased in that State is not a right of property passing as assets of the deceased, but is a specific power to sue created by their local law, it does not pass to the plaintiff as administratrix in Massachusetts, and this suit cannot be maintained by her.

*Demurrer sustained.*¹

DENNICK v. RAILROAD COMPANY.

SUPREME COURT OF THE UNITED STATES. 1880.

[Reported 103 *United States*, 11.]

ERROR to the Circuit Court of the United States for the Northern District of New York.

¹ A few cases often cited as in agreement with this case are not in point. *McCarthy v. C. R. I. & P. R. R.*, 18 Kan. 46; *Woodard v. M. S. & N. I. R. R.*, 10 Oh. S. 121; *Needham v. G. T. R. R.*, 38 Vt. 294.

In some jurisdictions the same conclusion is reached on the ground that the statutes of the two States are not identical in terms. *Ash v. B. & O. R. R.*, 72 Md. 144, 19 Atl. 643; *Railway Co. v. McCormick*, 71 Tex. 660, 9 S. W. 540. — Ed.

MILLER, J. It is understood that the decision of the court below rested solely upon the proposition that the liability in a civil action for damages which, under the statute of New Jersey, is imposed upon a party, by whose wrongful act, neglect, or default death ensues, can be enforced by no one but an administrator, or other personal representative of the deceased, appointed by the authority of that State. And the soundness or unsoundness of this proposition is what we are called upon to decide.

It must be taken as established by the record that the accident by which the plaintiff's husband came to his death occurred in New Jersey, under circumstances which brought the defendant within the provisions of the first section of the act making the company liable for damages, notwithstanding the death.

It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offence was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury.

It is indeed a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right.

Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the Circuit Court of the United States for the Northern District were competent to try such a case when the parties were properly before it. *Mostyn v. Fabrigas*, 1 Cowp. 161; *Rafael v. Verelst*, 2 W. Bl. 983, 1055; *McKenna v. Fisk*, 1 How. 241. We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish that in all cases where the several States have substituted the statute for the common law, the liability can be en-

forced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases. See *Ex parte Van Riper*, 20 Wend. (N. Y.) 614; *Lowry v. Inman*, 46 N. Y. 119; *Pickering v. Fisk*, 6 Vt. 102; *Railroad v. Sprayberry*, 8 Bax. (Tenn.) 341; *Great Western Railway Co. v. Miller*, 19 Mich. 305.

But it is said that, conceding that the statute of the State of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction.

The statute does not say this in terms. "Every such action shall be brought by and in the names of the personal representatives of such deceased person." It may be admitted that for the purpose of this case the words "personal representatives" mean the administrator.

The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such a suit shall *not* be brought by her. This is in direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the State or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here, also, by construction, "if they reside in the State of New Jersey"?

It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference, it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say that it depends on the appointment of an administrator within the State?

The second section relates to the remedy, and declares who shall receive the damages when recovered. These are the widow and next of kin. Thus far the statute declares under what circumstances a defendant shall be liable for damages, and to whom they shall be paid. In this there is no ambiguity. But fearing that there might be a question as to the proper person to sue, the act removes any doubt by designating the personal representative. The plaintiff here is that representative. Why can she not sustain the action? Let it be remembered that this is not a case of an administrator, appointed in one State, suing in that character in the courts of another State, without any authority from the latter. It is the general rule that this cannot be done.

The suit here was brought by the administratrix in a court of the State which had appointed her, and of course no such objection could be made.

If, then, the defendant was liable to be sued in the courts of the State of New York on this cause of action, and the suit could only be brought by such personal representative of the deceased, and if the plaintiff is the personal representative, whom the courts of that State are bound to recognize, on what principle can her right to maintain the action be denied?

So far as any reason has been given for such a proposition, it seems to be this: that the foreign administrator is not responsible to the courts of New Jersey, and cannot be compelled to distribute the amount received in accordance with the New Jersey Statute.

But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute.

Again: it is said that, by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his lifetime. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, such as specific property devised to individuals, or the amount which by the legislation of most of the States is set apart to the family of the deceased, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and impose on him the duty of distributing under that law. There can be no doubt that an administrator, clothed with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay it over to some one who establishes a better right thereto, or that what he so recovers is held in trust for some one not claiming under him or under the will. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs.

It is to be said, however, that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and that an administrator appointed under the law of that State would be held to have recovered to the same uses, and subject to the remedies in his fiduciary character which both statutes prescribe.

We are aware that *Woodward v. Michigan Southern & Northern Indiana Railroad Co.* (10 Ohio St. 121) asserts a different doctrine, and that it has been followed by *Richardson v. New York Central*

Railroad Co., 98 Mass. 85, and *McCarthy v. Chicago, Rock Island, & Pacific Railroad Co.*, 18 Kan. 46. The reasons which support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the Court of Appeals of New York, in the case of *Leonard, Administrator, v. The Columbia Steam Navigation Co.*, not yet reported, but of which we have been furnished with a certified copy.

The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different States. The questions growing out of these statutes are new, and many of them unsettled. Each State court will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decision, this court must decide for itself the question now for the first time presented to it, and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action.

*Judgment reversed with directions to award a new trial.*¹

O'REILLY v. NEW YORK AND NEW ENGLAND RAILROAD.

SUPREME COURT OF RHODE ISLAND. 1889.

[Reported 16 *Rhode Island*, 388.]

DURFEE, C. J.² The second count is designed to subject the defendant corporation to liability under a statute of Massachusetts, Pub. Stat. of Mass., cap. 112, §§ 163, 212, 213. The count is defective in some particulars, but counsel, waiving these defects for the present, have asked us to decide whether the action is maintainable in this State.

The liability is imposed by section 213. That section provides that if a person is injured by collision with the engines or cars of a railroad corporation at a crossing, such as is described in section 163, and it appears that it neglected to give the signals required by section 163, and that such neglect contributed to the injury, the corporation shall be liable, in case the life of the person so injured is lost, to damages recoverable by the executor or administrator of the deceased, in an action of tort, as provided in section 212, unless it is shown that in addition to a mere want of ordinary care, the person injured was at

¹ *Acc. Texas & P. Ry. v. Cox*, 145 U. S. 593; *Stewart v. B. & O. R. R.*, 168 U. S. 445; *Wilson v. Tootle*, 55 Fed. 211; *Western & A. R. R. v. Strong*, 52 Ga. 461; *Burns v. Grand Rapids & I. R. R.*, 113 Ind. 169; *Bruce v. C. R. R.* 83 Ky. 174; *Chicago, S. L. & N. O. R. R. v. Doyle*, 60 Miss. 977; *Missouri Pac. Ry. v. Lewis*, 24 Neb. 848; *Usher v. West Jersey R. R.*, 126 Pa. 206; *Nashville & C. R. R. v. Sprayberry*, 8 Baxt. 341; *Nelson v. Chesapeake & O. Ry.*, 88 Va. 971, 14 S. E. 838. — Ed.

² Only so much of the opinion as discusses the second count is given. — Ed.

the time of the collision guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence or unlawful act contributed to the injury.

Section 212 subjects railroad corporations to liability where, by reason of their carelessness, the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger, or in their employment, is lost. The provision for such case is, that the offending corporation may be punished by fine or indictment, or sued for damages in an action of tort, the fine imposed, or the damages recovered, according as one or the other remedy is pursued, to be not less than five hundred nor more than five thousand dollars, the damages, in case the corporation is civilly prosecuted, "*to be assessed with reference to the degree of culpability of the corporation, or of its servants or agents.*" The fine is to be paid "to the executor or administrator for the use of the widow and children of the deceased in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin;" and in case of a civil action, which is to be brought by the executor or administrator, the damages recovered are to go in the same manner. The remedy, whether criminal or civil, is to be prosecuted within a year after the injury.

The requirement of section 163 is, that every locomotive shall be furnished with a bell and steam whistle, and that the bell shall be rung or the whistle sounded, at the distance of at least eighty rods from every grade crossing, and be kept ringing or sounding, continuously or alternately, until the engine has passed. The claim is that the injury to the intestate resulted from an omission to ring the bell or sound the whistle as required.

It will be seen that the statute creates an entirely new cause of action, giving the executor or administrator of the deceased power to prosecute it: not, however, in his representative capacity, since he is empowered to prosecute, not for the benefit of the estate, but for the use of certain designated persons. The question is, whether an executor or administrator, appointed in Rhode Island, shall be taken to have the right to prosecute the action in the courts of Rhode Island. Similar questions, arising under somewhat similar statutes, have been differently decided by different tribunals. The following cases hold that such an action is not maintainable out of the State by which it is authorized. *Richardson, Adm'r, v. New York Central R. R. Co.*, 98 Mass. 85; *Woodward v. The Mich. S. & N. Ind. R. R. Co.*, 10 Ohio St. 121; *Taylor's Adm'r, v. The Pennsylvania Co.*, 78 Ky. 348; *McCarthy, Ad'm, v. Railroad Co.*, 18 Kans. 46; *Vawter v. The Missouri Pacific Railway Co.*, 84 Mo. 679. See also *Anderson v. Milwaukee & St. Paul R. R. Co.*, 37 Wis. 321; *Pickering v. Fisk*, 6 Vt. 102; *Judge of Probate v. Hibbard et als.*, 44 Vt. 597; also, 8 Amer. Rep. 396; *Illinois Central R. R. Co. v. Cragin*, 71 Ill. 177. The following cases allow such an action. *Dennick v. Railroad Co.*, 103

U. S. 11; Leonard v. Columbia Steam Navigation Co., 84 N. Y. 48; Stockman v. Railroad Co., 15 Mo. App. 503. The ground of decision in the two last named cases is, that the cause of action accrued under a statute which, notwithstanding some minor differences, was substantially the same as a statute of the State in which the action was brought. The decision in Dennick v. Railroad Co. rests on that and more general grounds of comity. The liability in question in each of said three cases, however, was remedial, not penal, the rule of liability being no more exacting than it would have been in favor of the deceased if he had survived, and the damages recoverable being recoverable as compensation.

We have in this State a statute subjecting railroad corporations to liability for negligence resulting in death, Pub. Stat. R. I. cap. 204, §§ 15, 16, 17, and 18, but it differs materially from the Massachusetts statutes especially in that it has none of the penal features of that statute. For this reason we do not think it necessary to decide which of the two sets of cases above cited lays down the true doctrine; for it seems to be well settled that each of the States will be left by the others solely to itself to give effect to its penal legislation. Commonwealth v. Green, 17 Mass. 515, 540; Hunt & wife v. Town of Pownal, 9 Vt. 411, 417; Scoville v. Canfield, 14 Johns. Rep. 338; Brigham, Assignee, v. Claffin, 31 Wis. 607, 616; First National Bank of Plymouth v. Price *et al.*, 33 Md. 488; Halsey v. McLean, 12 Allen, 438; Derrickson v. Smith, 27 N. J. Law, 166; Bird v. Hayden, 2 Abb. Pr. n. s. 61. That the liability imposed by the Massachusetts statutes is penal is very clear. The damages, as we construe the provision, are directed "to be assessed with reference to the *degree of culpability* of the corporation, or of its servants or agents," and to the amount of at least five hundred dollars. These directions clearly show a punitive purpose. So likewise, confirmatorily at least, does the direction that the recovery shall not be prevented by contributory negligence, unless it be gross or wilful. One of the remedies given by section 212 is an indictment, the fine prescribed in case of conviction being not less than \$500 nor more than \$5,000. The same remedy is given by section 213, if the injury be not mortal. It would seem that where death ensues there is provision only for a civil action, but the provision is part and parcel of legislation which has its penal purpose thus clearly stamped upon it.

Our conclusion is that an action founded on said provision is not maintainable in this State, and that the demurrer to the second count must be sustained.

*Demurrers sustained.*¹

¹ *Acc.* Dale v. A. T. & S. F. R. R., 57 Kan. 601, 47 Pac. 521; Adams v. Fitchburg R. R. 67 Vt. 76, 30 Atl. 687. — ED.

GARDNER v. NEW YORK AND NEW ENGLAND RAILROAD.

SUPREME COURT OF RHODE ISLAND. 1892.

[*Reported 17 Rhode Island, 790.*]

TILLINGHAST, J. This is an action of trespass on the case, to recover damages for injuries alleged to have been sustained by the negligence of the defendant corporation.

The accident occurred at a grade crossing on the defendant's road at Danielsonville, in the State of Connecticut; and the third count of the plaintiff's declaration is based upon sections 3553 and 3554 of the General Statutes of said State of Connecticut, which are set forth in said count.

These sections are as follows: —

“SECT. 3553. Every engine used upon any railroad shall be supplied with a bell of at least thirty-five pounds' weight, and a suitable steam whistle, which bell and whistle shall be so attached to such engine as to be conveniently accessible to the engineer, and in good order for use.

“SECT. 3554. Every person controlling the motions of any engine upon any railroad shall commence sounding the bell or steam whistle attached to such engine when such engine shall be approaching, and within eighty rods of, the place where said railroad crosses any highway at grade, and keep such bell or whistle occasionally sounding until such engine has crossed such highway; and the railroad company in whose employment he may be shall pay all damages which may accrue to any person in consequence of any omission to comply with the provisions of this section; and no railroad company shall knowingly employ any engineer who has been twice convicted of violating the provisions of this section.”

The defendant has demurred to said third count in the plaintiff's declaration, on the ground that the said statute, upon which it is based, is penal in its nature, and, being a statute of another State, there can be no recovery under it beyond the territory in and for which it was enacted.

The plaintiff makes no contention that a penal statute has any extraterritorial force, but simply claims that the statute counted on is remedial only, and not penal in its nature.

The only question raised by the demurrer therefore is, whether said section 3554 is penal in its nature.

A penal statute is one by which some punishment is imposed for a violation of the law. A statute may be penal in one part and remedial in another: Sutherland on Statutory Construction, § 208, and cases cited; and in such case, when it is sought to enforce the penalty, it is to be construed as a penal statute; and when it is sought to enforce the civil remedy provided, it is to be construed as remedial in its

nature. While the statute before us imposes a duty upon the defendant corporation with regard to the giving of signals at grade crossings, it does not impose any penalty for the neglect or violation of such duty. The only punishment, if such it may properly be called, for such neglect or violation of duty, is the damages to which it may subject itself at the suit of the party who is injured by reason thereof.

It is true that the last clause of said section 3554 reads like a penal statute, in that it provides that "no railroad company shall knowingly employ any engineer who has been twice convicted of violating the provisions of this section." But, notwithstanding this prohibition upon the railroad company, there is no penalty provided for its violation; nor is there any mode provided, so far as we are informed, whereby an engineer may be convicted for violating the provisions of said statute.

We are therefore of the opinion that said statute is not penal either in whole or in part, but remedial only. It simply provides that a railroad company shall pay all damages which may accrue to any person in consequence of any omission to comply with the provisions thereof. And it is well settled that where a statute only gives a remedy for an injury against the person committing it to the person injured, and the recovery is limited to the amount of loss sustained, or to cumulative damages, as compensation for the injury, it falls within the class of remedial statutes. *Blaine v. Curtis*, 59 Vt. 120; *Brice v. Gibbons*, 8 N. J. Law, 324.

There are cases which even go to the extent of holding that statutes giving double damages for injuries sustained by reason of the neglect of towns to keep their highways in repair, and for injuries by dogs, are remedial and not penal, the cumulative damages being given as compensation. *Stanley v. Wharton*, 9 Price, 301. See *Reed v. Northfield*, 13 Pick. 94; *Mitchell v. Clapp*, 12 Cush. 278; *Palmer v. York Bank*, 18 Me. 166; *Bayard v. Smith*, 17 Wend. 88.

The counsel for the defendant contends that the statute relied on by the plaintiff in the count demurred to is very similar to the one relied on in *O'Reilly v. N. Y. & N. E. R. R. Co.*, 16 R. I. 388, 392, which last named statute this court held to be penal in its nature. We fail to see the similarity between these two statutes. In the Massachusetts statute relied on by the plaintiff in the case last cited, the railroad company is subjected to liability where, by reason of its carelessness, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in its employment, is lost. "The provision for such case," said Durfee, C. J., in delivering the opinion of the court, "is, that the offending corporation may be punished by fine, or indictment, or suit for damages in an action of tort, the fine imposed, or the damages recovered, according as one or the other remedy is pursued, to be not less than five hundred nor more than five thousand dollars; the damages, in case the corporation is civilly

prosecuted, *to be assessed with reference to the degree of culpability of the corporation or of its servants or agents.*"

That statute clearly comes within the definition of a penal statute as above given. A penalty is attached for its violation, and a mode is provided for the recovery of such penalty, while, in the statute before us in this case, there is no penalty attached to the violation thereof.

Demurrer overruled.

WALSH v. NEW YORK AND NEW ENGLAND RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[*Reported 160 Massachusetts, 571.*]

HOLMES, J.¹ This is an action of tort to recover for a personal injury suffered by the plaintiff in Connecticut. . . .

If, however, we assume, as was ruled and as we do assume, that if the accident had happened in this State the plaintiff could not have recovered, it is argued that he cannot recover now. A decision in Wisconsin and language from some English cases are cited which more or less favor this contention. *Anderson v. Milwaukee & St. Paul Railway*, 37 Wis. 321; *The Halley*, L. R. 2 P. C. 193, 204; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28, 29; *The M. Moxham*, 1 P. D. 107, 111. Possibly, when it becomes material to scrutinize the question more closely, the English law will be found to be consistent with our views. But however this may be, we are of opinion that, as between the States of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties. See *Higgins v. Central New England & Western Railroad*, 155 Mass. 176. It is unnecessary to consider whether we should be prepared to adopt in its full extent what is thought by the learned editor of Story, *Conflict of Law* (8th ed.), § 625, note *a*, to be the true doctrine, — that "whether the domestic law provides for redress in like cases should in principle be immaterial, so long as the right is a reasonable one and not opposed to the interests of the State." The cases cited, *Dennick v. Railroad Co.*, 103 U. S. 11, and *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48, go further than the decisions of this State. *Richardson v. New York Central Railroad*, 98 Mass. 85. The policy of the supposed Connecticut rule cannot be said to be opposed to that prevailing here, even apart from statute. See St. 1893, c. 359.

*Exceptions overruled.*²

¹ Part of the opinion is omitted. — Ed.

² *Acc. Herrick v. M. & S. L. R. R.* 31 Minn. 11. — Ed.

SECTION III.

OBLIGATIONS EX CONTRACTU.

WAYMELL v. REED.

KING'S BENCH. 1794.

[*Reported 5 Term Reports, 599.*]

IN assumpsit for goods sold and delivered, the defence was, that the contract was a smuggling transaction. It appeared in evidence that the defendants had applied to the plaintiff, who was a foreigner living at Lisle, for a quantity of lace, which he knew was intended to be smuggled into England; and for that purpose it was packed by the plaintiff in a peculiar manner, by the direction of the defendants, for the more easy conveyance of it without a discovery. A verdict was taken for the plaintiff, subject to be set aside, and a nonsuit entered, if this court should be of opinion that the plaintiff was not entitled to recover under these circumstances; — a rule having been obtained for that purpose,

Erskine and *Best* showed cause; admitting that, if this had been a transaction between subjects of this country, the plaintiff, according to the doctrine laid down in *Biggs v. Lawrence*, 3 Term. Rep. 454, could not have recovered; neither could he, if he had been concerned in the risk of smuggling them into this country: but they contended that the bare circumstance of knowledge that the goods were to be smuggled, could furnish no ground of objection against the plaintiff, who was a foreigner residing abroad; and who, not owing any allegiance to this country, was not bound by any moral or political ties to take cognizance of its revenue laws. And they relied upon the case of *Holman v. Johnson*, Cowp. 344, as establishing the distinction they insisted upon. As to the circumstance of the plaintiff's having assisted in packing the goods in a particular manner, it was done in consequence of the special orders of the defendants, the buyers, whose directions in that respect it was their business to obey; but that cannot vary the case, unless they assisted in transporting the goods into this country. The question in all the cases has been, Whether the delivery abroad were complete: if it have been, the seller, especially in the case of a foreigner, is not responsible for the use intended to be made of the goods afterwards. And here the sale was complete before the goods left Lisle. The cases of *Biggs v. Lawrence*, *supra*, and *Clugas v. Penaluna*, 4 Term Rep. 466, went on the ground that the contracting parties were subjects of this country; and therefore that it was illegal for the plaintiffs to assist him in packing the goods for the purpose of smuggling them. But the

case of *Holman v. Johnson* was expressly recognized in both those cases.

Bower and Garrow, contra, were stopped by the court.

LORD KENYON, C. J. It is not necessary to enquire now, Whether or not it be immoral for a native of one country to enter into a contract with the subject of another, to assist the latter in defrauding the revenue laws of his country? It is sufficient, in order to dispose of this case, to advert to the distinction laid down by Lord Mansfield in *Holman v. Johnson, supra*, to which I entirely subscribe, that where the contract and delivery of goods are complete abroad, and the seller does not act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving assistance to the defendants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid, that purpose. He cannot, therefore, resort to the laws of this country to assist him in carrying his contract into execution. What was said by Lord Mansfield, at the end of *Holman v. Johnson*, comes up to the present case.

BULLER, J. In *Holman v. Johnson*, the seller did not assist the buyer in the smuggling; he merely sold the goods in the common and ordinary course of trade. But this case does not rest merely on the circumstance of the plaintiff's knowledge of the use intended to be made of the goods; for he actually assisted the defendants in the act of smuggling, by packing the goods up in a manner most convenient for that purpose. And if he undertook to deliver the goods in that manner, knowing the use intended to be made of them, he was offending against the laws of this country in the very contract itself.

GROSE, J., declared himself of the same opinion.

Rule absolute.

HILL v. SPEAR.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1870.

[*Reported 50 New Hampshire, 253.*]

FOSTER, J.¹ The main question in this case is, whether Stewart, represented here by the defendant, an attaching officer, holding the property of Emerson by virtue of Stewart's attachment, can, as against the plaintiff, claiming title to the same by purchase from Emerson, hold the property thus attached; the object of Stewart's suit and attachment being to recover the price of spirituous liquors sold by him to Emerson, and by Emerson resold in violation of our laws; — or, in

¹ Part of each of the opinions, in which the authorities bearing on the question are exhaustively examined, is omitted. — Ed.

fewer words, whether, under the circumstances of this case the court will lend its aid towards the enforcement of Stewart's claim to recover the price of the spirituous liquors thus sold by him.

In order to make a correct application of the principles and rules of law which are to determine this question, it will be necessary to examine with care the peculiar facts of the case.

Stewart was a dealer in spirituous liquors, residing and doing business in the city of New York: Emerson was a retailer of spirituous liquors at his saloon in Manchester. This establishment, in the hands of Emerson and his predecessors in the same business, was well known to Stewart, who had frequently visited the saloon, and of whom Emerson and the preceding proprietors of the saloon had previously bought liquors which were retailed by them to their customers.

There was evidence from which the jury might have found that, on at least one occasion when Stewart was at the saloon, he virtually solicited orders from Emerson for liquors; and there was evidence tending to show that when he solicited such orders, and, subsequently, sold liquors to Emerson, Stewart had reasonable cause to believe, and did believe, that Emerson intended to resell them at his saloon in Manchester. Not long after one of these visits, on which occasion he had solicited such orders, Emerson ordered liquors of Stewart by letter (not, however, in pursuance of any previous contract or understanding); and the liquors so ordered were delivered by Stewart to a carrier in New York, directed to Emerson at Manchester, N. H., and were duly received by Emerson.

It does not appear as a matter of fact, that Stewart, when he solicited the orders or sold the liquor, was acquainted with the laws of this State regulating the sale of spirituous liquors; and the court refused to permit the plaintiff to inquire of Stewart whether he did not understand that the sale of liquor in New Hampshire was prohibited except by town agents.

The ruling of the court in this particular was correct. Ignorance of the law would have furnished no excuse to Stewart. *Broom's Leg. Maxims*, 190. Every man is presumed to know the laws of the country in which he dwells, or in which, if residing abroad, he transacts business. A foreigner, trading in or to this country, is bound to take notice of our laws; and a contract made by him in violation of them will not be enforced in our courts. *Cambiosoco v. Maffit*, 2 Wash. C. C. 98; 1 Bishop on Criminal law, § 375.

The plaintiff contends that Stewart, by coming into this State and here soliciting orders for liquors, knowing that, if purchased, they were to be sold by the purchaser in violation of our law, committed an indictable offence; that he was an aider or an accessory to the offence of selling the liquors by Emerson; that the contract of sale, upon which Stewart claims as a creditor of Emerson, grows out of and is connected with an immoral and an illegal act, and is therefore not to be protected or enforced by our courts; and that Stewart, therefore, is

not, as a creditor of Emerson, entitled to impeach the validity of the alleged sale by Emerson to the plaintiff.

It is an elementary principle that no contract can be enforced, nor any damages recovered, for the breach of a contract or promise which contravenes the principles of the common law, the provisions of a statute, or the general policy of the law. Metcalf on Contracts, 221.

And it is well settled in this State, that the consideration agreed to be paid for spirituous liquors sold without license, cannot be recovered. The sale being prohibited by statute, and the vendor being liable to a criminal prosecution for the selling, the traffic is made illegal, and contracts respecting it cannot be enforced. Wherever an indictment can be sustained for the illegal sale, there the price cannot be recovered. *Smith v. Godfrey*, 28 N. H. 384, and cases cited; *Plumer v. Smith*, 5 N. H. 553; *Met. on Contracts*, 225.

The reasons which lie at the foundation of these well-established principles are suggested by considerations of sound public policy. The public good and not the defendant's advantage is the controlling consideration. *Beach v. Kezar*, 1 N. H. 185. For I apprehend the moral instincts of courts and juries would naturally revolt against the encouragement of a defence so mean, impudent, and contemptible.

"The objection," says Lord Mansfield, in *Holman v. Johnson*, Cowp. 348, "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff; not for the sake of the defendant, but because the court will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*." The law in such cases leaves the parties where it finds them. *Chitty on Contracts*, 731; *Bayley v. Taber*, 5 Mass. 286; *Roby v. West*, 4 N. H. 285.

But, generally speaking, the validity of a contract is to be decided by the law of the place where it was made, unless it was agreed, either expressly or by tacit implication, that it should be performed in some other place; and then the general rule is, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. *Story on Conf. of Laws*, §§ 242, 280; *United States Bank v. Donnally*, 8 Pet. 372; *Wilcox v. Hunt*, 13 Pet. 379; *Andrews v. Pond*, 13 Pet. 65; *Don v. Lippman*, 5 Cl. & F. 13; *Fergusson v. Fyffe*, 8 Cl. & F. 121. Contracts, valid by the law of the place where they are made, are generally valid everywhere, *jure gentium*, and by tacit consent. 2 *Kent's Com.* (ed. 1866) 454.

And if, in the place where the contract was made, the policy of the

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local law would enforce it, it will also be enforced in the jurisdiction to which a party may be compelled to resort for the application of his remedy for a breach of the foreign contract.

This rule, it has been said, is founded not merely in the convenience, but in the necessities of nations and States: for, otherwise, it would be impracticable for them to carry on an extensive intercourse and commerce with each other.

"Jus autem gentium omni humano generi commune est; nam usu exigente, et humanis necessitatibus." 1 Inst. Lib. 1, tit. 2, § 2.

Upon the foundation of this doctrine rests the whole system of sales, agencies, credits, and negotiable instruments; "and," says Judge Story, "no more forcible application can be propounded of this imperial doctrine, than to the subject of international private contracts." Story's Conf. Laws, § 242.

With peculiar cogency does the doctrine apply to the positive necessities of a country like ours, composed of thirty-seven distinct sovereignties, in strictness wholly independent of each others' local laws, but most essentially dependent for their general prosperity upon the deference, respect, and regard for each others' peculiar policy which the comity of nations demands.

But there is an important exception to the rule, consisting in this: that no nation or State is bound to recognize or enforce contracts which the Government of such State or nation may deem injurious to its own interests or the welfare of its own people, or which are in fraud and violation of its own laws. Such contracts are considered as nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made. Story's Conflict of Laws, § 244; *Andrews v. Pond*, 13 Pet. 65.

The exception is important, notwithstanding the imperative necessity which lies at the foundation of the rule; for, while the comity of nations and States will always regard with respect and consideration the laws and customs of other communities, still its own interests and the welfare of its own citizens will nevertheless be held by every State in paramount consideration. One of the most difficult questions, therefore, with which the courts of the various States composing the Federal Union have to deal, is precisely that now presented: namely, To what extent will the courts go in sustaining an exception that takes out of the general rule and invalidates a contract sought to be enforced here, which, though entirely legal in the jurisdiction where the contract was made, is regarded, in this State, as contrary to morality or the provisions of our local statute?

Viewed in the light of all these suggestions, the principal question presented is, whether the evidence which shows that Stewart knew or had reasonable cause to believe that Emerson, at the time of the sale to him, intended to transport the liquors into this State, to be here kept and sold in violation of our laws, would constitute a defence, if the present suit were brought by the vendor against the vendee to recover the price of the liquors.

In considering this matter, we are not for a moment to lose sight of, nor to underrate the importance, the imperative necessity for the enforcement of the rule; and we are to admit no given case within the exception, unless by the compulsion of a necessity demanded by local policy or positive law.

It is claimed by the plaintiff that the present case falls within the exception.

The case of *Smith v. Godfrey*, before cited, must be regarded as decisive to a *certain extent* of the questions involved in this inquiry; and as fully sustaining the ruling of the judge at the trial term, in refusing to give the *first* branch of the instructions desired by the plaintiff. It is there held that "bare knowledge on the part of the vendor of goods that they are to be sold in another State contrary to the laws of that State, will not make the sale of the same illegal in the State where the sale is not prohibited." It is also there held that the price of goods sold and delivered in a State where such sale is legal, and where nothing remains to be done by the vendor to complete the transaction, and he is not in any way to be further connected with it, may be recovered in this State, where such sale would be illegal. "Aliter, if it be an ingredient in the contract that the goods shall be illegally sold, or that the seller shall do any act to assist or facilitate the illegal sale."

In the present case, it is conceded that the sale by Stewart to Emerson was consummated in New York, that the goods were there delivered to Emerson's agent and that the sale was not in violation of the laws of that State.

The only remaining question then is, whether this case is brought within the exception alluded to, because of the mixture of any ingredient in the original contract of sale providing that the goods should be illegally sold by Emerson, or by any act of Stewart, aiding, assisting, or facilitating the illegal sale in this State. But there is no evidence that the contract of sale between Stewart and Emerson was complicated by any "ingredient" concerning the subsequent disposition of the liquors by Emerson; and the "act" of assistance or facilitation of a subsequent illegal sale by Emerson was neither more nor less than this: "On at least one occasion when Stewart was at the saloon, he virtually solicited orders from Emerson for liquors," *believing*, at the time, that Emerson intended to re-sell them at his saloon in New Hampshire.

It does not appear, nor is it suggested, that Stewart advised, requested, or encouraged the sale of the liquors by Emerson contrary to law, in any other way than by soliciting him to purchase them; nor that he had any participation in the resale otherwise than by furnishing the liquors to Emerson for a price which does not appear to have been regulated by any consideration relative to the final disposition of the property by Emerson. Stewart's connection with the transaction terminated with his delivery of the goods to the carrier, an agent of Emerson, in New York. It does not even appear that Stewart had

any actual knowledge of Emerson's purpose or intentions with regard to the disposition of the liquors.

The authorities bearing more or less directly upon the subject before us, are quite numerous and somewhat conflicting. . . .

There can be no doubt that the plaintiff's general proposition is sound — that the mere *soliciting* another to commit an indictable offence is itself indictable, — *The State v. Avery*, 7 Conn. 267; and also that the inciting, encouraging, and aiding another to commit a misdemeanor is itself a misdemeanor, — *Russ. on Crimes* 46, 47; but it is one thing to solicit a person to *buy* liquors in the ordinary course of lawful trade, and another and very different thing to solicit him to *sell* them in violation of law; see *Finch v. Mansfield*, 97 Mass. 89. And it is one thing to furnish a person, by means of a lawful sale and purchase, with articles which the purchaser *may*, and probably will, apply to an improper use, and another and very different thing to incite, aid, and encourage the purchaser in committing an offence against law, with or by means of the property which he *may* use for lawful and proper purposes.

It is not spirituous liquors only, but innumerable kinds of merchandise, which *may* be applied to improper and unlawful uses. And it would be wholly impracticable, as well as unwise and unjust (because restraining to an unreasonable extent the trade and commerce of the country), to require the vendor of all sorts of merchantable goods to scrutinize the plans and purposes of the purchaser with regard to the use of the commodity, and to sell only at the peril of forfeiting the price in every case where a jury might find that the seller had reason to suppose the purchaser intended to make an improper or unlawful use of the article.

Considerations of local policy, of good morals, of the safety of society, and the protection of our own citizens are not to be disregarded; but they are to control and make subservient the interests of commerce and the comity of States, only when these considerations are of unquestionable preëminence. The requirement of what is too loosely termed public policy must be imperative, admitting of no doubt. Till such be the acknowledged case, the reason, logic, precedent, and authority of the law must supersede and ignore any mere system of moral principles, however pure and attractive, or however efficient in the abstract it may seem, for the proper regulation of the actions and manners of men. . . .

Our conclusion will have been anticipated; but it is proper to make a brief practical application of the foregoing considerations.

Stewart resided in New York, and carried on there a lawful business. In the regular course of trade he filled orders for liquors, selling and delivering them in the State of New York, as he might lawfully do. But, when he sold these liquors, he had reason to believe and did believe that Emerson intended to resell them in New Hampshire; and, doing business here, he was bound to take notice that such resale

of the liquors by Emerson here would be unlawful. Still, it seems to us too clearly settled to be disputed, that the contract of sale was not invalidated by reason of Stewart's mere knowledge of Emerson's unlawful designs.

Stewart's offence, then, which is said to taint and corrupt the contract of original sale, consists solely in soliciting the purchase of these liquors, with knowledge that, if purchased, Emerson would be likely to resell them contrary to law.

But Stewart did not solicit such a disposition of the liquors by Emerson; the liquors were not sold to him with a view to such disposition, or to any disposition of them by Emerson. Stewart neither derived nor contemplated any advantage from Emerson's unlawful dealings with the goods; the payment for them was not dependent upon, nor the price enhanced by, any considerations relating to Emerson's use of them. His solicitation was that of traders in their general practice, as expressed in their advertisements and circulars — "Your patronage is respectfully solicited" — and Stewart's connection with the matter terminated with the delivery of the goods to Emerson's agent in New York.

We are of the opinion that this solicitation, accompanied by the vendor's knowledge of Emerson's course of business and his belief that these liquors would probably be disposed of in accordance with that course of business, does not bring the case within the rule, whereby contracts affected by illegal considerations have been invalidated, nor, as we think, does it come within the principle which lies at the foundation of those wholesome maxims of the law which this plaintiff has invoked; none of which are infringed or sought to be impaired by this decision.

Moreover, we cannot lose sight of the fact that there is no evidence, and of course there can be no presumption in law (but rather the contrary), that these liquors were resold by Emerson at all. They may have been used, contrary to the original intent of the purchaser, for personal or family use, or for lawful chemical or mechanical purposes, by the vendee, or they may have been taken by him to a State where the sale of such goods was not prohibited by law.

"Intention," says Mr. Justice Smith, in *Bell v. Woodward*, 47 N. H. 540, "is subject to change; and a naked intention, where no act has been done, is not admissible as tending to show a probability that the intention will thereafter be carried into effect."

We are bound to look at the contract alone, quite independent of subsequent transactions growing out of it. The contract was ended when Stewart delivered the goods; and subsequent dealings with the property by Emerson or others, either in furtherance of or contrary to the original design of the purchaser, cannot relate back to the original sale, and make that illegal which, at the conclusion of the original contract, was not illegal.

Suppose the vendor understands that the vendee wants the liquor for

an honest and lawful purpose. Still he puts into his hands the means of violating the law. The buyer in fact intends to, and does, violate the law. Clearly the sale would be legal and valid. Shall the vendor's misunderstanding of the purchaser's intentions, then, taint the original contract by retroaction?

Suppose again, that, for the sake of the argument, we concede that mere knowledge of an existing intention to violate the law by the purchaser renders the contract of sale void. The illegal sale by the original vendor is made; the contract is ended; it is a void contract. But the purchaser changes his mind, becomes converted to the wholesome doctrine of temperance, and destroys the liquor, or uses it for lawful purposes. Does the subsequent diversion of purpose by the purchaser relate back to the original contract, so that now the original vendor can invoke our aid to recover the price fixed by the original invalid and unlawful sale?

Not only upon authority, but upon correct principle, we are compelled to disallow the plaintiff's positions. The substance of the decision in *Smith v. Godfrey* is, that the vendor's claim to recover for the price of spirituous liquors, sold with knowledge of the purchaser's intention to resell them contrary to law, will not be denied, unless it be "an ingredient in the contract that the goods shall be illegally sold, or that the seller shall do some act to assist or facilitate the illegal sale."

The present case does not differ from that, unless the mere solicitation by Stewart shall be regarded as an ingredient in the contract that the goods shall be illegally sold, or unless such mere solicitation shall be considered an act assisting or facilitating the subsequent illegal sale.

The term solicitation, here, cannot have any forced or unusual meaning. There is scarcely ever a sale and purchase among traders, without solicitation by the seller. We are unable to regard the circumstance of such solicitation as of any importance whatever, as affecting the subsequent contract of sale by Stewart, much less the later disposition of the goods by Emerson.

It has been urged in argument that the moral sense of this community requires us to place this case within the exception to the rule of comity which is ordinarily applied to foreign contracts, and to apply to the sale of spirituous liquors the principle which should be applied in the case of the sale of a deadly poison to a murderer, with knowledge of his intentions.

We have no disposition to discountenance or oppose the doctrine of the immorality or the positive sinfulness of the indiscriminate sale of spirituous liquors, even if this were, as it is not, the appropriate place or tribunal for considerations of this character. But the remedy for the suppression of intemperance cannot be afforded by courts of law, at the sacrifice and violation of established legal principles and rules. The philanthropy of the courts is not to be exemplified by despotism and the exercise of arbitrary power. Courts act in the forms and by the rules of law, expressed by legislative will; and when the plaintiff,

here, tells us that the course of legislation in this State, by its expression of repugnance to the traffic in spirituous liquors, calls upon us, by judicial power, to annul this contract, we cannot agree with him; but our reply is, such legislative expression is *not* given. Year after year, and step by step, the legislators of this State have proceeded with their enactments relative to intemperance and the sale of intoxicating drinks, mindful of the course of legislation in neighboring commonwealths, borrowing here a little and there a little from the laws of other jurisdictions; avoiding, likewise, in some instances, the example of other legislators.

Zealous reformers, constantly agitating this subject, cannot have been unmindful of the legislation, heretofore alluded to, in Massachusetts and Connecticut, whereby such a sale as this was there made ineffectual, by force of express law.

Nothing could have been easier or simpler than for our legislators to have said, if such had been their will, or such in their judgment the will or desire of their constituents, "No action of any kind shall be had or maintained in any court for the price of any spirituous or intoxicating liquor sold in any other State for the purpose of being brought into this State, to be here kept or sold in violation of law, under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained such illegal purpose." But they did not say it, as Massachusetts and Connecticut did; and having seen fit to stop short of this point in the progress of reform, it cannot be required of the courts that they should go further than the law-makers themselves, and usurp their legitimate functions.

It cannot be said that the public policy of this State forbids the enforcement of this contract, and approves the gross immorality and dishonesty which, alone, could prompt such a defence, when made by the purchaser.

In Massachusetts, as we have seen, the mandate of legislative power was laid upon the courts, with respect to contracts like this; and willingly obedient thereto, such contracts were declared illegal, and parties seeking their enforcement were turned out of court. In 1868 the mandate was withdrawn, the statute of 1855 was repealed, the common law revived, and then the vendor of goods, in a State where the sale was lawful, came to the courts of Massachusetts to recover under such a contract, and under exactly such circumstances as surround the present case, and had his claim allowed.

This court, it is to be presumed, will not be reluctant to execute the laws in the spirit of their purpose and intent. We sit here not to do our own will, nor to make laws; nor to administer them according to our own notions, but by prescribed rules.

The legislature may interfere, if the public good demands more stringent laws. Such enactments as we have referred to in Massachusetts and Connecticut do not, in any degree, conflict with any of those constitutional principles which are established for the protection of private

rights or private property. Cooley on Constitutional Limitations 596, 597; Webster v. Munger, 8 Gray, 587; Reynolds v. Geary, 26 Conn. 179.

But so long as the people do not thus express their will, through the forms of constitutional legislation, we are bound to adhere to the principles which lie at the foundation of our commercial prosperity, and to admit no case within the exception to the rule which those principles have established, unless the demand is enforced by stronger considerations than the present case presents to our minds.

Our conclusion is that there was no error in the refusal to give to the jury the instructions desired by the plaintiff.

Judgment on the verdict.

SARGENT, DOE, and LADD, JJ., concurred.

BELLOWS, C. J., dissenting. . . . The question then is, whether our courts are required, as matter of comity, to enforce a contract made abroad in favor of a citizen of another country, which it would not enforce in favor of one of our own citizens, upon the ground that it was a contract knowingly made to furnish the means of violating a positive law of our own State, and contrary to public policy.

In considering this question, it is readily conceded that the authority of *Smith v. Godfrey* should not hastily be disregarded or overthrown without the most cogent reasons for it; but there are circumstances to be considered that in my judgment materially diminish its weight at the present time.

That decision was in 1854; and since then the law in respect to the traffic in spirituous liquors has undergone a great change, so that there can now be no question that the traffic in such liquors, contrary to law, is immoral. Immoral, not only because it is a violation of positive law, which is everywhere, of late years, coming to be regarded as of itself immoral; but immoral, because in its consequences it is highly destructive to the peace, good order, and morals of society, the fruitful parent of crime, poverty, insanity, and almost every form of human debasement and suffering. Intemperance, indeed, is the master vice of the age, and imperatively calls for the united exertions of all the wise and the good in the community to find some remedy for its great and growing evils; and I cannot but regard the illegal traffic in spirituous liquors as clearly immoral.

It is also to be observed, that since the decision in *Smith v. Godfrey*, the case of *Cutler v. Welsh*, 43 N. H. 497, was decided, settling fully the doctrine that furnishing means to violate a positive law of the State is in itself illegal, though the act is not *malum in se*, and a contract arising out of it cannot be enforced in this State; thus repudiating the doctrine of *Faikney v. Reynous*, 4 Burr, 2069, and *Petrie v. Hannay*, 3 T. R. 418, and qualifying materially the doctrine of *Holman v. Johnson*, Cowp. 341.

Looking at the question in its broadest aspects, it is this: whether

a sale of liquors, made by a citizen of another State, in that State, to a citizen of this State, to be brought here and sold in violation of our laws, the seller knowing that such is the purpose, is to be regarded by our courts as valid and to be enforced.

The purpose of the buyer in this purchase is, to violate our laws, to commit an indictable offence; and the seller knows it. Is he not then himself morally guilty of the same offence, when he knowingly puts into the hands of another the means of committing it?

Does it change the character of the act morally, that when he does so he stands the other side of the State line, where he fully understands what our law is, and that the offence is to be committed? Does it not come within the strong denunciations of Eyre, C. J., in *Lightfoot v. Tenant*, 1 B. & P. 551, just the same as if he stood on the New Hampshire side of the line?

Take the case of money lent to game with, or weapons furnished to commit a crime with, or to make war on a nation with whom we are at peace: can the character of the act depend on the locality of the State line, whether on the one side or the other of the parties, when making the contract?

In foro conscientia, it is undeniable that there can be no difference. If the acts were done in this State, it is clear that no court here would enforce a contract growing out of them; and so it would be if done out of the State, but by citizens of this State, as is shown by the cases of *Biggs v. Lawrence*, 3 T. R. 454, and *Clugas v. Penaluna*, 4 T. R. 466.

What principle then of comity requires us to enforce such a contract in favor of a citizen of another State, when his contract is made with full knowledge of its object, and has the same moral taint that would deprive a citizen of our own State of all remedy?

The purpose of the buyer being to break our laws, the seller, having knowledge of it, must be regarded as participating in the offence, — as a party to a sale, made to defraud creditors, is held to participate in that intent if he had knowledge of it, whether he really had any purpose to defraud anybody or not.

And so it is generally in such things, — a person having knowledge of an act of fraud and in any way lending his aid to effect it, is deemed a party to it, whatever his real motive.

As to *Holman v. Johnson*, it is clear that Lord Mansfield considered the contract not to be immoral, and upon the ground that the revenue laws, as well as the offences against them, are all *positivi juris*, and not *malum in se*. His view of the subject is seen in the expression, that no country ever takes notice of the revenue laws of another.

Had that great judge regarded the contract as immoral, there can be no doubt that his decision would have been the other way.

Whatever might have been the view in respect to the breach of a revenue law by a citizen of a foreign country, we can entertain no doubt that it is an immoral act in such citizen to aid in a violation of the laws for the suppression of intemperance, by furnishing the means

to do it; and even in respect to the revenue laws, any aid furnished to facilitate such violation, as by packing the goods in a peculiar way for that purpose, would invalidate the contract.

It is to be observed, also, that the doctrine of *Holman v. Johnson* was applied in a case where, according to the habits of the times, the breach of the revenue laws, especially by a citizen of a foreign country, was regarded as involving less moral turpitude than a breach of almost any other law, although now such distinctions are in law not recognized.

It should also be considered that, owing to the insular condition of Great Britain, a doctrine that might not be productive of great mischief there might be wholly unsuited to a country like ours, consisting of a family of contiguous States, having constant and large intercourse, a common origin, a similarity of laws and institutions, and a considerable familiarity with each others' policy and laws; add to this the fact that they are all united under one general government, and that the citizens of one State are entitled to all the privileges of citizens of the several States, and we have a case where, on a question of this sort, the inhabitant of a contiguous State can hardly be looked upon as a foreigner unacquainted with our laws, but really occupying a position enabling him to contribute to the violation of laws with about the same effect as if he lived among us, and was privileged to supply to everybody the means of breaking our laws. If it be desirable to enforce our laws for the suppression of intemperance, a policy that shall protect a traffic just outside our limits, by which everybody may be supplied with the means of breaking those laws, would be perfectly suicidal.

I am aware that it is said that the person who buys these liquors does not deserve any protection against the claims of the seller; and that is admitted to be true; but this is a totally inadequate view of the subject. It is not for the sake of such buyers, but to suppress an immoral and mischievous traffic by refusing to enforce contracts growing out of it.

So long as this rule in *Holman v. Johnson* is recognized, we shall continue to have upon us an army of liquor dealers in the neighboring States, using all the skill which experience has gathered to induce our citizens to violate the laws, and to teach them how to do it with the best chance of impunity.

From such a power and from such doctrines great mischief is to be apprehended; and I cannot conceive that we are under obligation, as matter of comity, to enforce contracts of that kind. It is a case, indeed, where we are excused upon the ground that the traffic is highly injurious to us.

If the authority of *Smith v. Godfrey* is too firmly established to be shaken, and mere knowledge in the seller is not enough to render the contract invalid, the question then is, whether the coming into this State and soliciting orders for these liquors, or encouraging the defend-

ant to buy and sell the liquors in this State in violation of law, would render such sale invalid.

The coming into this State and soliciting orders for liquors, and encouraging the party to buy and sell contrary to law, is to my mind a more direct participation in the violation of the law, than the packing the goods in a convenient way for smuggling, inasmuch as here is a direct request, or what is equivalent to it, to break the law.

In *Territt et al. v. Bartlett*, 21 Vt. 184, the order for the liquors was given in Vermont, but the sale completed in New York, the seller knowing that they were to be sold in violation of law, — it was held that for all practical purposes it must be considered that the sale was made in Vermont; and the plaintiff could not recover. A similar doctrine was held in *How et al. v. Stewart*, 40 Vt. 145.

In *Aiken v. Blaisdell*, 41 Vt. 655, where the plaintiff forwarded the liquors from New York to defendant, in a disguised form, to evade detection, it was held that he could not recover; the court holding that positive acts in aid of the unlawful purpose, however slight, are sufficient.

In *Wilson v. Stratton*, 47 Me. 120, where orders for liquors were given in Maine, and the goods delivered in Boston, the court speaks in this wise, after saying that plaintiffs could not be ignorant of the existence of their laws prohibiting this traffic. "Yet, in the face of these laws and of the known and settled policy of the State, they send their agents into the State to seduce our citizens to enter into contracts, looking directly to their violation; and after having succeeded by such solicitation in inducing them to enter into such a contract, they come before our courts and ask them, on the principle of comity, to enforce them on the technical ground that they were completed in another State. Such proceedings are manifestly in fraud of the laws of the State, and cannot be upheld upon any sound principle of comity." In *Webster v. Munger*, 8 Gray, 584, it was held that a sale made in one State, with a view to a resale in another contrary to law, is invalid, and would not be enforced in the latter State; and Thomas, J., holds that mere knowledge of the purpose would defeat it. From these cases, as well as the others cited from the law reports, it is evident that the courts, both in England and this country, are disposed to lay hold of slight circumstances to avoid the doctrine of *Holman v. Johnson*; and I think the coming into this State and soliciting orders, and encouraging the sale of liquors contrary to law, is a much more decided participation in the illegal act than many of the cases reported, where it is held to make the seller a party.

If I understand aright the opinion of Mr. Justice Clifford in *Green v. Collins*, 3 Cliff. 494, the distinction he makes is between a case of mere knowledge in the seller, and acts done by him to facilitate the violation of the law; and he illustrates his view by reference to the English case of *Brown v. Bennett*, 1 Camp. 349, where the plaintiff furnished articles of equipage or dress to a female keeping a house of ill-fame, for

the purpose, and of a character, to enable her to make a display ; and he says that the decision was upon the ground that the act of supplying a female engaged in such immoral practices would warrant a jury in finding that the articles were intended to facilitate the objects of her vocation ; and he says that sales under such circumstances may well be presumed to have been made with the intent to facilitate the objects of the purchaser, and if so, then the contract is clearly void.

He also says that different rules have been sometimes applied in the construction of contracts made for the sale of goods in one country, intended to be exported into another in violation of its revenue laws ; but he declines to enter that field of inquiry, as such a question is not raised, although the liquors, the subject of the suit, were sold in Rhode Island to be used in Massachusetts, the sale being valid by the laws of the State where it was made.

If the liquors were sold with the full knowledge that the buyer was to sell them in this State in violation of our laws, a jury could not fail to find that the sale was made to facilitate and aid the buyers in such violation.

What, indeed, could more decisively aid in such breach of the law than to furnish him upon credit with the very means to do it, knowing that they are to be so used.

It would be a reproach to the intelligence of a jury to suppose that they could hesitate so to find it, or to find that this was encouraging the buyer to violate the law.

The fact is, that in all cases where one man furnishes another with the means to commit a crime, knowing that they are to be so used, the law deems him to be a participant in the guilt of the offence ; and this applies in its full force to the case under consideration. Nor is it any answer to say that the original intention of the buyer may be abandoned, and the liquors sold elsewhere, and lawfully ; but if the law is in fact broken, and the seller furnishes the means to do it knowing that they are to be so used, he cannot be excused by the fact that the means *might* have been otherwise used, any more than, in case he had furnished another with arsenic to poison a man, he could be excused by alleging that it might not have been used for the purpose for which it was furnished, or that it might not have been effectual. In truth, when liquor dealers across the line of our State are habitually aiding our citizens in the violation of laws made for the protection not only of the public morals, but of the very lives of our people, there is an impudence in coming to our courts, and asking them to enforce contracts growing out of such traffic, that is almost sublime.

It is obvious that they are doing all they can do to render inoperative a law which the courts are bound to enforce so long as it remains on the statute book ; and then they ask the same courts to protect them in these efforts to break down our laws, by treating their contracts as meritorious and legal.

To do this would be extending the doctrine of comity to a point altogether inconsistent with the public safety.

By our laws no spirituous liquors can be sold here except by agents duly appointed by law; and to ensure the sale of pure liquors only, these agents are required to purchase of persons designated by the governor alone; and those persons are required to give bonds to ensure the furnishing of pure, unadulterated liquors. With a full knowledge of these provisions and in utter disregard of them, liquor dealers across the line systematically endeavor to nullify these provisions, and deprive us of all security against the introduction of adulterated and poisonous liquors; and the argument is, that their conspiracies against our laws are carried on beyond the limits of this State, and therefore we are bound to regard them as not only not illegal, but of such a character that our courts are bound to enforce contracts made to accomplish this nullification of our laws.

If this be so, it is due to a decision made long ago by a very eminent judge in a matter involving few of the moral aspects of the present question, and upon views and doctrines which have since been discarded or modified, and which decision has been, incautiously, as I think, followed in many subsequent cases.

I feel sure, however, that this doctrine cannot stand the test of a careful examination upon principle, and I therefore am ready to hold that comity does not require us to enforce the contract now in question. Upon these views I am compelled to dissent from the opinion of the majority of my brethren.¹ ●

SMITH, J., concurred.

FLAGG v. BALDWIN.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1884.

[Reported 38 *New Jersey Equity*, 219.]

MAGIE, J.² The bill in this case was filed for the foreclosure of a mortgage made by Jennie M. Flagg and William L. Flagg, her husband (who are the appellants), to Abram F. Baldwin (who is the respondent), upon lands in this State, to secure the payment of appellants' bond. The bond and mortgage were dated August 26, 1880. The bond was in the ordinary form of a money obligation and was conditioned for the payment to respondent of \$11,563.44, with interest, on demand. The mortgage recited that it was intended to secure the

¹ In accordance with the opinion of the majority, see *Webber v. Donnelly*, 33 Mich. 468. *Contra*, *Webster v. Munger*, 8 Gray, 584 (but see *Frank v. O'Neil*, 125 Mass. 473); *Terrill v. Bartlett*, 21 Vt. 184. If the agent of the seller, cognizant of the buyer's illegal purpose, solicits the order within the State, no recovery can be had though the sale was valid where made. *Wilson v. Stratton*, 47 Me. 120; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384. — ED.

² Part of the opinion is omitted. — ED.

money which appellants had so bound themselves to pay, and that the amount of \$11,563.44 was made up of \$7,563.44, which was therein declared to be then due from appellants to respondent, and of \$4,000 to be security for future advances.

From the proofs it appears that the sum of \$7,563.44, so admitted to be due from appellants to respondent, was made up of different sums. One sum represented the loss which had been incurred by Mr. Flagg in a stock speculation which had been carried on by him and one Ripley with respondent, a stockbroker in New York. Another sum represented losses incurred by Mr. Flagg in a like speculation carried on by him and respondent in joint account. Another sum represented losses incurred in a like speculation originally carried on by Mr. Flagg with respondent and afterwards transferred to and carried on by Mrs. Flagg (under the control and management of her husband) with respondent. The losses thus incurred were the result of stock dealings for these respective parties upon a margin sometimes put up in cash, and in Mrs. Flagg's case in her own note, which represented her margin.

The \$4,000 of future advances were designed and intended as a margin for a continuance of the stock speculation of Mrs. Flagg, to be carried on in her name under the management of her husband with respondent, and the advances contemplated by both parties were such as would cover and make good her losses therein, if any.

Respondent's books show that the bond and mortgage were credited to Mrs. Flagg's account for the sum of \$11,563.44, and that account had been charged with the previous losses. It appears further that the speculative stocks carried in that account have all been closed out with the result of leaving a balance in Mrs. Flagg's favor of \$653.93. Since the mortgage entered into the account, the effect is that there is due thereon the sum of \$10,909.51, with interest, and its foreclosure and the sale of the mortgaged premises must be conceded unless some of the defences are sustained.

The main defence goes to the validity of the bond and mortgage, and contests them on the ground that the contracts out of which they arose were wagering contracts and illegal and void, and that the bond and mortgage securing an indebtedness arising solely from such cause are tainted with the same illegality and cannot be enforced.

In coming to the consideration of the question thus raised, it is obvious that it is important to determine at what place the contracts contested were made. For if they are New Jersey contracts and subject to our law, the sole question is whether they are such contracts as are declared unlawful by the "act to prevent gaming." Rev. p. 458. While if they are contracts of another place, it must be preliminarily determined whether they are objectionable by the laws of the place of contract; or if not, whether they will still be enforced by our courts.

The evidence seems to leave no room for doubt that the contracts in question are contracts made and to be performed in the State of New

York. The transactions anterior to the execution of the bond and mortgage took place wholly within that State. By the bond and mortgage the parties averred they resided in that State. The mortgagee did, in fact, reside there. The mortgage was acknowledged there. Delivery of the papers was made, and the remaining transactions took place there. Although the mortgage affected lands in this State, the above-stated facts establish, according to a long line of decisions, that the contracts were New York contracts. *Cotheal v. Blydenburgh*, 1 Hal. Ch. 17; s. c., 1 Hal. Ch. 631; *DeWolf v. Johnson*, 10 Wheat. 367; *Dolman v. Cook*, 1 McCart. 56; *Campion v. Kille*, 1 McCart. 229; s. c., 2 McCart. 476; *Atwater v. Walker*, 1 C. E. Gr. 42.

Where contracts of a particular kind are forbidden by the law of the State in which they are sought to be enforced, and the party seeking to enforce them relies on the fact that they were made in a foreign State and are valid contracts by the *lex loci contractus*, it has been held elsewhere that he is bound to aver and prove those facts. *Thatcher v. Morris*, 11 N. Y. 437.

But the rule which seems to have been established in this State requires one who defends against a foreign contract, if he relies on its being invalid by force of the *lex loci contractus*, to both set up and prove the foreign law. *Campion v. Kille*, *ubi supra*; *Dolman v. Cook*, *ubi supra*; *Uhler v. Semple*, 5 C. E. Gr. 288.

We have, then, to deal with transactions which took place within the State of New York and must be presumed to be governed by the laws of that State. Whatever may be the rule respecting the burden of setting up and proving the law of the foreign State under such circumstances, neither appellants nor respondent have furnished in their pleadings or proofs any information on the subject. In the absence of proof of the law of another State, the better opinion is that, at least with respect to States comprised in the territory severed from England by the revolution, the presumption is that the common law prevails. *White v. Knapp*, 47 Barb. 549; *Stokes v. Macken*, 62 Barb. 145; *Holmes v. Broughton*, 10 Wend. 75; *Thurston v. Percival*, 1 Pick. 415; *Shepherd v. Nabors*, 6 Ala. 631; *Walker v. Walker*, 41 Ala. 353; *Thompson v. Monrow*, 2 Cal. 99; *Inge v. Murphy*, 10 Ala. 885; *Norris v. Harris*, 15 Cal. 226; *Titus v. Scantling*, 4 Blackf. 89; *Crouch v. Hall*, 15 Ill. 263; *Brown v. Pratt*, 3 Jones (N. C.) Eq. 202.

By the common law, contracts of wager and similar contracts were not objectionable *per se*. They were, in fact, enforced by the courts without any objection on the score of being dependent on a chance or casualty. Courts did, in some instances, refuse to enforce such contracts, but only when the subject of the wager was objectionable, as tending to encourage acts contrary to sound morals (*Gilbert v. Sykes*, 16 East, 150); or being injurious to the feelings or interests of third persons (*De Costa v. Jones*, Cowp. 729); or against public policy or public duty (*Atherfold v. Beard*, 2 T. R. 610; *Tappenden v. Randall*, 2 B. & P. 467; *Shirley v. Sankey*, 2 B. & P. 130; *Hartley v. Rice*, 10 East, 22).

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It has not been urged, nor does there seem to be ground for contending, that the transactions in question were such as by the common law would not be enforced.

We are therefore required to determine whether these contracts, made in the State of New York, and presumed to be governed, as to their validity, by the doctrines of the common law and not objectionable thereunder, are to be enforced in this State.

The common law under which such contracts were enforceable has been here altered by the passage of the act against gaming above referred to. By the first section, all wagers, bets, or stakes, made to depend on any lot, chance, casualty, or unknown or contingent event, are declared to be unlawful. By the third section, all bonds, mortgages, or other securities made or given, where the whole or any part of the consideration shall be for money laid or betted in violation of the first section, or for repaying money knowingly advanced to help or facilitate such violation, are declared to be utterly void.

If the contracts now sought to be enforced would be obnoxious to these provisions of our statute, if made in this State, are we to enforce them because made in New York, where we are bound to presume the common law exists unaltered?

The enforcement of a foreign law and contracts dependent thereon for validity, within another jurisdiction and by the courts of another nation, is not to be demanded as a matter of strict right. It is permitted, if at all, only from the comity which exists between States and nations. Every independent community must judge for itself how far this comity ought to extend. Certain principles are well-nigh universally recognized as governing this subject. It is everywhere admitted that a contract respecting matter *malum in se*, or a contract *contra bonos mores*, will not be enforced elsewhere, however enforceable by the *lex loci contractus*. An almost complete agreement exists upon the proposition that a contract valid where made will not be enforced by the courts of another country, if, in doing so, they must violate the plain public policy of the country whose jurisdiction is invoked to enforce it, or if its enforcement would be injurious to the interest or conflict with the operation of the public laws of that country. Story's Conf. Laws, § 244; 1 Addison Cont. § 241; Forbes v. Cochrane, 2 B. & C. 448; Grell v. Levy, 16 C. B. (N. S.) 73; Hope v. Hope, 8 De G., M. & G. 731; 2 Kent's Com. 475; Bank of Augusta v. Earle, 13 Pet. 519; Ogden v. Saunders, 12 Wheat. 213; Blanchard v. Russell, 13 Mass. 1. This proposition has been announced and applied in our own State. Varnum v. Camp, 1 Gr. 326; Frazier v. Fredericks, 4 Zab. 162; Moore v. Bonnell, 2 Vr. 90; Bentley v. Whittemore, 4 C. E. Gr. 462; Watson v. Murray, 8 C. E. Gr. 257; Union L. & E. Co. v. Erie R. Co., 8 Vr. 23.

Since the courts of each State must, at least in the absence of positive law, determine how far comity requires the enforcement of foreign contracts, it results that there is contrariety of view, and the proposi-

tion above stated is not universally admitted. Thus, in *New York*, a contract made in *Kentucky*, under a law of that State, establishing a lottery for the benefit of a college, was upheld, notwithstanding the law of *New York* prohibiting lotteries. *Com. of Ky. v. Bassford*, 6 Hill, 526. Chief Justice Nelson limited the cases of contracts not enforceable, though valid where made, to such as are plainly contrary to morality. He gave no consideration to the doctrine elsewhere settled, that excludes from enforcement contracts opposed to the public policy or violative of a public law of the place of enforcement. In this view, he seems to be sustained by the court of appeals. *Thatcher v. Morris*, 11 N. Y. 437.

So, in *Massachusetts*, a contract arising out of a completed sale of lottery tickets, in a State where such sale was lawful, was enforced by the courts, although such sale was there prohibited by statute. *McIntyre v. Parks*, 3 Metc. 207. But there was no discussion of principles by the court.

The courts of this State have expressed and enforced different views. Thus, in *Varnum v. Camp*, 1 Gr. 326, the question of the validity of a foreign assignment for the benefit of creditors came before the Supreme Court. The assignment was made in *New York*, and was assumed to be valid by the law of that State. It created preferences, and by the law of this State was fraudulent and void. The assignment was held unenforceable here. Chief Justice Ewing, whose opinion was adopted by the court, puts the decision distinctly upon the ground that the assignment was one in violation of the policy of our laws, in hostility with their provisions, and which they declared to be fraudulent and void. In *Bentley v. Whittemore*, 4 C. E. Gr. 462, a similar question arose in this court, and the doctrine of *Varnum v. Camp* was restated and affirmed. The application of the doctrine was, however, limited to the protection of the residents and citizens of this State, for whose benefit its public policy was held to be adopted. With respect to non-residents, or citizens of other States, it was held that comity would require the recognition of foreign assignments if valid where made. *Watson v. Murray*, *ubi supra*, was the case of a bill filed for an account of a partnership transaction in a lottery in another State, where such a transaction was claimed to be lawful. The bill was dismissed on the advice of Vice Chancellor Dodd. His conclusion was that such a transaction, though valid where made, should not be enforced here, because it was in violation of a public law of this State, and within the exceptions to the rule of comity requiring the enforcement of foreign contracts. He further argued that lotteries are not only illegal, but are to be judicially considered to be immoral. It is unnecessary to determine how far that view can be sustained. But with the conclusion arrived at I unhesitatingly agree. It is in accord with the decisions in *Varnum v. Camp* and *Bentley v. Whittemore*. It seems to me that no court can, on full consideration, deliberately adopt a rule that will require the enforcement of foreign contracts, violative

of the public laws and subversive of the distinct public policy of the country whose laws and policy they are bound to enforce. No *comitas inter communitates* can compel such a sacrifice.

The limitations on the rule laid down in *Bentley v. Whittemore* do not come in question in this case. It appears that Mrs. Flagg was, in fact, a resident of this State at the time these contracts were made, and there is nothing to show a change of residence.

We are brought, then, to the question whether our law against gaming is such a public law and establishes such a public policy as to require us to refuse to enforce foreign contracts in conflict with it, in a case like that under consideration. I think this question must be answered in the affirmative.

It is true that, in *Dolman v. Cook* and *Campion v. Kille*, *ubi supra*, foreign contracts, valid by the law of the State where made, were enforced here, although by our law they were usurious and declared to be void. No consideration seems to have been given to the question whether our usury law was such a law and evinced such a public policy as required us to refrain from enforcing foreign contracts in conflict with it. As we have seen, that consideration led our courts to reject foreign assignments violative of our laws, where the interests of our own citizens were concerned. But a plain distinction at once presents itself between a usury law and a law regulating assignments for the benefit of creditors, or a law against gaming. One affects only the parties to the contract, and is framed for the protection of the borrower. The others relate to the public or classes of the public who are interested therein and affected thereby.

But our law against gaming goes further than to merely prohibit the vice or avoid contracts tainted with it. It declares it unlawful, and so puts the contracts beyond the protection of the laws or the right of appeal to the courts. The reason and object of the law are obvious. The vice aimed at is not only injurious to the person who games, but wastes his property, to the injury of those dependent on him, or who are to succeed to him. It has its more public aspect, for if it be announced that a trustee has been false to his trust, or a public officer has embezzled public funds, by common consent the first inquiry is whether the defaulter has been wasting his property in gambling.

In my judgment, our law against gaming is of such a character, and is designed for the prevention of a vice, producing injury so widespread in its effect, the policy evinced thereby is of such public interest that comity does not require us to here enforce a contract which, by that law, is stigmatized as unlawful, and so prohibited.

It remains to determine whether the enforcement of these contracts will conflict with the provisions of this statute and the public policy thereby established. If so, it must be for the reason that the mortgage secures an indebtedness arising out of transactions that are wagers.

In considering this question, care should be taken not to trench upon legitimate and proper enterprises. The act is not intended to interfere with the right of buying and selling for speculation.

The line is to be drawn between what is legitimate speculation and what is unlawful wager. When property is actually bought, whether with money or with credit, the purchaser and owner may lawfully hold it for a future rise and risk a future fall. With such transactions, the law does not pretend to interfere. They are within the line of lawful speculation.

But when, either without any disguise or under a guise which simulates such legitimate enterprises, the real transaction is a mere dealing in the differences between prices, *i. e.*, in the payments of future profits or future losses, as the event may be, then, in my judgment the line which separates lawful speculation from illegal wagering is crossed, and the contract, under our law, becomes unlawful, and the securities for it void. . . .

My conclusion is that these transactions, so far as affected by our law against gaming, are to be examined, to discover their real nature, and if, however unobjectionable their form may be, the real contract is merely in respect to differences, the contract is a wager, both void and unlawful.

On examining the transactions in question in this cause, with a view to discover their real character, I am compelled to the conclusion that, however they may have been made to imitate real transactions, they were in fact mere wagers. It never was contemplated, intended, or agreed, by either party, that the stocks purchased or sold were to become or to be treated as the stocks of appellants. The real contract disclosed by the evidence was to receive and to pay differences. . . .

As I interpret the transactions, respondent, in consideration of commissions and interest on advances, agreed to buy and hold stock in anticipation of a rise; or to sell stock of his own, or borrowed for that purpose, in anticipation of a fall. The agreement required him to pay the profits of the transaction, which would otherwise be his, to appellants. On the other hand, appellants, in consideration of his thus carrying the stock bought, or providing the stock sold, agreed that in case of a rise or fall to a certain amount, the stock should be closed out, and the loss, which otherwise would fall on respondent, should be paid by them to him. The bargain contained all the elements of a wager. It is not less a wager because one of the parties obtained a guaranty for the performance of the bargain by the other party.

For these reasons my conclusion is that the transactions in question were wagers within the meaning of our law; that the securities given for them would be absolutely void if the contracts were made in this State; that although made in a foreign State, and not objectionable by the law which must be presumed (in the absence of proof) to govern them, they will not be, and ought not to be, enforced in this State, be-

tween these parties, because to enforce them would be opposed to a public policy on this subject of the vice of gaming, perspicuously shown by our law on that subject.

The decree below must be reversed, and a decree entered dismissing the bill. Appellants are entitled to their costs.¹

HOPE v. HOPE.

CHANCERY. 1857.

[*Reported 8 De Gez, Macnaghten & Gordon, 731.*]

THIS was an original hearing of a demurrer by the defendant, John Adrian Hope, to an amended bill filed by his wife, Mathilde Emilie Hope. The substance of the case stated by the original bill was as follows:—

The marriage between the plaintiff, who was a Frenchwoman, and the defendant, who was an Englishman, took place, in 1845, in England. For some years after the marriage the husband and wife resided in France, where they became domiciled, and where their five children were born. In consequence of differences which arose between the plaintiff and the defendant, the latter, in the early part of 1853, sent all the children to England; but on the 21st of May in that year the two youngest, Adrian Elias and John Henry, were allowed by the defendant to be taken back to France, and were restored to Mrs. Hope. Proceedings took place before the French tribunals with respect to the custody of the children, and in August, 1853, the plaintiff instituted a suit against her husband in the Consistory Court of London in order to obtain a decree of divorce on the ground of cruelty and adultery, to which Mr. Hope filed a responsive allegation. On the 11th of November, 1853, the five infant children filed a bill in chancery by their next friend, praying that Mrs. Hope might be ordered to deliver up Adrian Elias and John Henry to their father in order that they might be brought up and educated in England, and on the 7th of June, 1854, the Lord Chancellor made an order in that suit that Mr. and Mrs. Hope should take all such steps as might be necessary and proper according to the law of France to cause the children to be delivered up to their father, but that he should permit Mrs. Hope to have access to them at all reasonable times (See 4 De G., M. & G. 329). Mrs. Hope presented a petition of appeal to the House of Lords from this order. In the meantime, by a decree of the Cour de Première Instance at Paris, dated the 21st of December, 1854, it was directed that the order

¹ *Acc. Pope v. Hanke*, 155 Ill. 617, 40 N. E. 839; *Lemonius v. Mayer*, 71 Miss. 514, 14 So. 33; *Watson v. Murphy*, 23 N. J. Eq. 257; *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, 45 Atl. 611. *Contra*, *Quarrier v. Colston*, 1 Phil. 147. — Ed.

of the Lord Chancellor should be carried into execution, but that pending Mrs. Hope's appeal the children should be placed at a school in Paris, where both their father and mother should have liberty to see them. Mrs. Hope appealed against this order to the Cour Impériale; but before either appeal came on to be heard an arrangement was made between her and her husband for the settlement of all matters in dispute, and ultimately an agreement was drawn up in the French language, which was executed by Mrs. Hope at Paris, on the 20th of March, 1855, and by Mr. Hope in London on the 22d. The bill set out a translation of the agreement, which was in the following terms:—

“By a judgment delivered by the Civil Tribunal of the Seine, dated 27th December, 1854, it was declared that there should be executed in France a judgment of the Lord Chancellor of England, which ordered that Mrs. Hope should be bound to deliver up to Mr. Hope the two sons issue of their marriage, Messrs. Adrian Elias and Jean Henry Hope. Mrs. Hope has appealed against this order; but, for the purpose of putting an end to these painful proceedings, the following terms have been entered into by the parties: 1. Mrs. Hope will immediately deliver up to Mr. Hope Mr. Adrian Elias Hope; Mr. Jean Henry Hope will remain under the care of his mother. 2. Mrs. Hope will abandon her suit for a divorce instituted against Mr. Hope in the English courts, and for that purpose she binds herself to sign without delay all such deeds and documents as may be required. 3. Mrs. Hope undertakes not to oppose the suit for a divorce instituted against her by Mr. Hope in the English courts, but on the contrary to facilitate the obtaining such divorce. It is well understood that Mrs. Hope shall be able to see her children, to write to them, and to receive letters from them. 4. Mr. Hope agrees to pay in France to Mrs. Hope the annual sum of 75,000 francs in accordance with the decision of the Ecclesiastical Court, to be paid quarterly and in advance. 5. Mr. Hope undertakes to pay, firstly, the expenses incurred in England by Mrs. Hope, and secondly, Mrs. Hope's debts in France, but on condition that such debts shall not exceed the sum of 60,000 francs. These payments shall be made by the hands of Mr. Hope's agents. 6. With regard to any accounts that may be unsettled between Mr. and Mrs. Hope, as well as the handing over to her any articles that may belong to her, the parties agree to leave the matter to be settled by Messrs. Paillet & Duvergier, whose decision shall be final.”

In pursuance of this agreement the plaintiff brought Adrian Elias Hope to England and delivered him up to Mr. Hope, John Henry remaining with her at Paris, and she withdrew her appeals both in this country and in France. Mrs. Hope's suit in the Ecclesiastical Court and the responsive allegation of Mr. Hope were both dismissed.

The bill went on to allege that the plaintiff had in all respects performed her part of the agreement, but that the defendant had refused to perform his part of it; that he refused the plaintiff all access

to the children, though she had frequently desired to visit them, and that he had paid no part whatever of the promised annuity, of the costs incurred by the plaintiff, or of the sum on account of her debts. The bill prayed a specific performance of the agreement of March, 1855; that the plaintiff might have access to her children at all reasonable times, that an account might be taken of the arrears of the allowance stipulated for by the agreement, and that the defendant might be ordered to pay such arrears and to give security for future payments and to pay the cost of the suit.

The defendant demurred to this bill for want of equity, and the Master of the Rolls overruled the demurrer (22 Beav. 351). An appeal by the defendant came to be heard before the Lords Justices in July, 1856, and their Lordships having intimated an opinion that if the demurrer were allowed leave must be given to amend, it was arranged that the demurrer should be allowed without prejudice to any question and with leave to the plaintiff to amend her bill, and that if the defendant should demur again the demurrer should be brought directly before the Court of Appeal.

The bill accordingly was amended by introducing statements to the following effect: That the defendant resided in England, and that by his refusal to perform his part of the agreement the plaintiff was reduced to destitution — that if proceedings could be instituted in the courts of France the defendants would be decreed to pay the allowance and the other sums mentioned in the agreement. That it was the intention of both parties that the agreement should be valid and binding on both of them in England as well as in France, and that the plaintiff had acted on the faith of its being so binding. That by the French law regard would be had to the circumstances under which the agreement was entered into, and that it would be carried into effect by the French tribunals against the defendant if he were still a resident in that country, and that although Monsieur Paillet, one of the referees named in the agreement, had since died, the plaintiff was willing that it should be carried into execution in any manner which the court might direct. The defendant again demurred.¹

TURNER, L.J. This is a suit instituted by a wife against her husband for the specific performance of an agreement entered into between them. The bill has been met by a general demurrer for want of equity. In the course of the argument before us, my learned brother expressed our united opinion, that if the law of this country only was to be taken into consideration in determining the case, the agreement could not be supported, and the demurrer must consequently be allowed, and we stopped the reply upon that point. The further consideration which I have since given to the subject has confirmed me in that opinion.

¹ Arguments of counsel and the concurring opinion of KNIGHT BRUCE, L.J., are omitted. — ED.

But it was argued for the plaintiff, in support of the bill, that in determining this case the law of France ought also to be taken into consideration, — that the agreement in question ought to be considered as an agreement entered into, or, at all events, to be performed in France, — that it is valid and capable of being enforced in France, and that effect ought therefore to be given to it by the law of this country, and upon these points we reserved our judgment.

Upon carefully examining the allegations of this bill, on which alone the case, being before us upon demurrer, must be decided, I think it far from clear that the bill alleges such a case as would in strictness warrant us in taking the law of France into consideration. But I should not feel satisfied to dispose of the case finally upon that ground, and I think it better, therefore, to consider it upon the assumption that the law of France is to be taken into account, and that the agreement in question would, according to that law, be capable of being enforced. Laying aside, then, the allegations of the bill which point to the introduction of the French law into the case, the bill alleges these facts: [His Lordship stated in order the substance of the allegations in the bill.]

No argument was addressed to us on the plaintiff's behalf with reference to that part of the bill which applies to the plaintiff's having access to her children, and seeks for relief in that respect. This part of the plaintiff's complaint, if well founded, is properly the subject of application in the suit in which the order for access has been made. That order having been made, the right given by it and the enforcement of that right cannot, as I apprehend, under any circumstances appearing upon this bill, properly be made the subject of a distinct suit, and the bill can derive no support from the introduction into it of this part of the case. The question is, whether, upon the assumption which I have stated as to the French law being taken into account, the bill can in other respects be maintained. I am of opinion that it cannot, and upon these grounds: I think that when the courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the courts of this country cannot, as I conceive, be called upon to enforce it. Now, there are two provisions of this agreement which, as it seems to me, are contrary to the law and policy of this country. By article 1 of the agreement one of the children is to remain under the care of the plaintiff, the mother. By article 3 of the agreement, Mrs. Hope, the plaintiff, undertakes "not to oppose the suit for a divorce instituted against her by Mr. Hope in the English courts, but, on the contrary, to facilitate the obtaining such divorce." Are these provisions consistent with our laws and policy?

The first of them is in contravention of the order of the Lord Chancellor stated in the bill. It is not only in contravention of that order, but, as I apprehend, is in contravention also of the settled law and policy of the country. The law of this country gives to the father the custody of the children and the control over them, and it gives him that custody and control not for his own gratification, but on account of his duties and with reference to the public welfare. Lord Eldon, speaking upon this subject in *Lord St. John v. Lady St. John*, 11 Ves. 531, says this: "Then how is it as to the children? The father has control over them by the law, as the law imposes upon him, with reference to the public welfare, most important duties as to them. If the husband can contract with his wife, who cannot by law contract with him (and in this instance the contract as to the children is between the husband and wife only), it deserves great consideration, before a court of law should by *habeas corpus* upon a unilateral covenant, as the Scotch call it, take from him the custody and control of his children, thrown upon him by the law, not for his gratification, but on account of his duties, and place them, against his will, in the hands of his wife." And again, in *Lord Westmeath's Case*, Jac. 251, Lord Eldon, upon *habeas corpus*, ordered two children of very tender years to be delivered to their father, notwithstanding an express agreement on his part that they should reside with their mother and be educated under her care and superintendence. I know of no authority contravening the doctrine thus laid down and acted upon by Lord Eldon, and I have no doubt, therefore, that this first article of the agreement is repugnant both to the law and policy of this country. That there may be circumstances which would justify such an agreement as this article contains it is not necessary to deny. No such circumstances are alleged by this bill.

Then, as to the 3d article of the agreement. There is nothing which the courts of this country have watched with more anxious jealousy, and I will venture to say, with more reasonable jealousy, than contracts which have for their object the disturbance of the marital relations. The peace of families, the welfare of children, depends, to an extent almost immeasurable, upon the undisturbed continuance of those relations; and so strong is the policy of our law upon this subject, that not only is marriage indissoluble, except by the legislature, but divorces *à mensâ et thoro* are granted only in cases of cruelty or adultery. But what is this article of the agreement? That the wife shall not oppose the husband's suit for a divorce, but, on the contrary, shall facilitate the obtaining it. I can conceive nothing more contrary to the policy of our law than this provision of the agreement. It is, as it seems to me, repugnant to the law, both as to the object which it has in view and the means by which that object is to be effected. Its object is the discontinuance of the marital relations without, so far as appears by this bill, any sufficient cause for the purpose, for the bill states no more than that there was a suit by the plaintiff for a divorce

and evidence taken upon it, and that upon that evidence the responsive allegation, the purpose of which is not stated, was dismissed; and the means by which this object is to be effected are, as I understand this agreement, by evading the due administration of justice in the courts of this country. Much of the argument on the part of the plaintiff was, and most properly, addressed to this part of the case. It was said that the wife's assistance in obtaining the divorce could be of no avail, for that the Ecclesiastical Court would not in such cases act upon the consent of the parties; but there are other modes of rendering assistance than by consent, — modes, too, of which the court may have no cognizance. But then it was said that the whole of the evidence had been taken in the suit, and that there could, therefore, be no deception upon the court; but it is one thing to take evidence, another to dissect and scrutinize it and lay it before the court. It was further said on the part of the plaintiff, that the proposed divorce would amount to no more than a separation, and that the law of this country recognizes separations between husband and wife; but I am very far indeed from being satisfied that the law of this country would recognize a separation upon such an agreement as this between the husband and wife alone, and besides there are consequences which attach to a sentence of divorce which do not belong to a separation by agreement merely. Giving full weight, however, to all these arguments on the part of the plaintiff, they furnish no answer to the objection that this is an agreement for evading the due administration of justice in England.

Lastly, it was urged on the plaintiff's behalf, that whatever objection there may have been to this agreement in its inception, what remains to be performed is legal and unobjectionable; but to hold that an agreement so objectionable as that this court would not perform it, can be rendered capable of performance by the objectionable parts of it having been carried into execution, is a doctrine to which I cannot assent.

Upon these grounds, without entering more into the other points which were argued before us, my opinion is that this demurrer ought to be allowed.¹

¹ *Acc. Grell v. Levy*, 16 C. B. N. S. 7 (champertous agreement); *Rousillon v. Rousillon*, 14 Ch. D. 351 (contract in restraint of trade); *Rogers v. Raines*, (Ky.), 38 S. W. 483 (agreement to pay attorney's fee); *Rowland v. B. & L. Assoc.*, 115 N. C. 825, 18 S. E. 965 (unconscionable agreement). — Ed.

GREENWOOD v. CURTIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1810.

[Reported 6 Massachusetts, 358.]

PARSONS, C. J.¹ This action is assumpsit on a promissory note for the delivery of slaves, and the payment of bars, which are an African currency, and also on an *insimul computassent*. A verdict has been found for the plaintiff, upon a trial on the general issue, subject to the opinion of the court upon a case stated by the parties.

Two objections have been made to the verdict by the counsel for the defendant. That the letters of *Hippias* were improperly admitted in evidence; — and if they were not, that no action can be maintained in this State on a breach of either of the supposed promises.² . . .

The second objection, that no action upon either of the promises alleged can be maintained in this State, is principally relied on by the defendant. The argument of his counsel has been supported with much ingenuity. The slave trade, he has argued, is or has been prohibited by a statute of the Commonwealth, in the preamble of which it has been declared to be an unrighteous commerce; and he attempted to show that in itself it was immoral. This objection deserves much consideration.

By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this State; although such contract may not be valid by our laws, or even may be prohibited to our citizens. Thus in States where a greater rate of interest is allowed than by our statute, a contract securing a greater rate of interest, but agreeably to the law of the place, may be sued in our courts, where the plaintiff shall recover the stipulated interest.

This rule is subject to two exceptions. One is, when the Commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment in our courts. — Thus a contract for the sale and delivery of merchandise, in a State where such sale is not prohibited, may be sued in another State where such merchandise cannot be lawfully imported. But if the delivery was to be in a State where the importation was interdicted, there the contract could not be sued in the interdicting State; because the giving of legal effect to such a contract would be repugnant to its rights and interest. — Another exception is, when the giving of legal effect to the contract would exhibit to the citizens of the State an example pernicious and detestable. — Thus if a foreign State allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have

¹ SEDGWICK, J., prepared a dissenting opinion, for which see 6 Mass. 362 n. — ED.

² Only so much of the case as discusses the second objection is given. — ED.

any validity here. But marriages not naturally unlawful but prohibited by the law of one State and not of another, if celebrated where they are not prohibited, would be holden valid in a State where they are not allowed. As in this State a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States; such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract. — Another case may be stated, as within this second exception, in an action on a contract made in a foreign State by a prostitute, to recover the wages of her prostitution. This contract, if lawful where it was made, could not be the legal ground of an action here; for the consideration is confessedly immoral, and a judgment in support of it would be pernicious from its example. And perhaps all cases may be considered as within this second exception, which are founded on moral turpitude, in respect either of the consideration or the stipulation.

Before the present case can be compared with this rule, including the exception to it, the merits of it must be ascertained.

In South Carolina it was lawful to purchase slaves on the coast of Africa, and to import them as merchandise into that State. And it does not appear that this purchase and importation was unlawful at Rio Pongos. The original contract was made at Rio Pongos, for the purpose of obtaining slaves to transport to Charleston. The account was stated at Rio Pongos, in which the defendant acknowledged a balance due in cash, which was assented to by the plaintiff in Charleston. Whether either of the contracts is to be governed by the law of Rio Pongos or of South Carolina is immaterial: for in either case it does not appear that either of them was invalid *lege loci*. Either of them, therefore, may be the ground of an action in this State, unless it come within one of the exceptions to the rule, even if a contract of this nature made by the citizens of this State should be void. To maintain the action, if it be not within the exceptions, is enjoined on us by the comity we owe another State. And to entitle the defendant to retain in his hands the debt which he justly owes, as between the parties, he ought clearly to show some principle by which he may defend himself in dishonestly retaining this property.

We do not perceive any injury that could arise to the rights or interests of this State or its citizens, if either of the contracts had been faithfully executed agreeably to the terms of it. It was made abroad, by persons not citizens of the Commonwealth, and to be executed abroad, having no relation in its consequences to our laws.

The defendant therefore, to establish his defence, must bring this case within the second exception; and show that the action, as considered by the laws of this Commonwealth, is a *turpis causa*, furnishing a pernicious precedent, and so not to be countenanced. This upon public principles he is authorized to do, notwithstanding he is a party to all the moral turpitude of the contract.

The argument is, that the transportation of slaves from Africa is an immoral and vicious practice, and consequently that any contract to purchase slaves for that purpose is base and dishonest, and cannot be the foundation of an action here within the principle of comity adopted by the common law. This objection may apply to the counts on the note but not to the count on the *insimul computassent*.

Laying the counts on the note out of the case, we shall consider the objection of moral turpitude, so far as it affects the count on the *insimul computassent*: and we are satisfied that the objection does not apply to the contract averred in this count; there being nothing immoral in the consideration on the plaintiff's part, or in the stipulation made by the defendant.—If a Charleston merchant should send a cargo of merchandise to Africa, for the purpose of there selling it, and with the proceeds to purchase slaves; and if the cargo be accordingly sold, and the purchaser agree to pay for it in slaves; and he afterwards shall refuse or neglect to deliver the slaves, but makes a new agreement with the owner to pay him a sum of money for his cargo, an action can unquestionably in our opinion be maintained on this new contract; and the illegal contract, being annulled or void, cannot affect it.—So, if the purchaser had delivered a part only of the slaves to the merchant, and afterwards agrees with him to pay the balance in cash, we see no objection to an action to recover this balance in cash, if the purchaser refuse to pay it.

In the present case the defendant having delivered a part only of the slaves, and having become a creditor of the plaintiff for supplies furnished to his use, states his account, in which after deducting the slaves delivered and the supplies furnished, he acknowledges a balance in cash, and the plaintiff, having assented to the account, demands the balance in this action we see no legal objection to his recovery. The consideration of the implied promise arising from this settlement is the sale of the cargo, which involves in it no moral turpitude; neither is the performance of the promise by paying the balance in cash immoral. And although on the same day the defendant, in consideration of this balance due in cash, promises by his note to discharge it principally in slaves, and the small remainder in cash; yet this promise is no bar to an action by the plaintiff on the account, even if the promise by the note is here considered as legal and *a fortiori* if it is considered as void for its immorality.—It is true if the defendant voluntarily discharged the note, the balance of the account could not afterwards be recovered, for the consideration of it was discharged by the payment of the note: nor could the payment of the note be recovered back, for *potior est conditio possidentis*.

In this case the defendant having acknowledged a balance of cash in his hands, the property of the plaintiff; although it came into his hands from the sale of the merchandise, for which he was to

pay in slaves, but did not, this balance as between the parties is justly due the plaintiff; and unless the principles of public policy against the action upon the *insimul computassent* are manifest, we cannot decide that the defendant shall not be held to pay what he justly owes.

In this view of the case we are satisfied that the action is maintained on the *insimul computassent*, and that the plaintiff may take his verdict on that count, and have judgment entered upon it.

*Judgment according to verdict.*¹

FONSECA v. CUNARD STEAMSHIP CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[Reported 153 Massachusetts, 553.]

THE plaintiff took passage on the defendant's steamer from Liverpool to Boston. He had with him on the ship his trunk, containing articles of clothing and personal property reasonable and proper for an ocean traveller to carry as personal baggage, all of which were entirely ruined on the voyage by the negligence of the defendant. When the plaintiff engaged his passage in London, he received a passage ticket from the defendant's agent there. This ticket consisted of a sheet of paper of large quarto size, the face and back of which were covered with written and printed matter. Upon the back, among other printed matter, was the following: "The company is not liable for loss of or injury to the passenger or his luggage, or delay in the voyage, whether arising from the act of God, the Queen's enemies, perils of the sea, rivers, or navigation, restraint of princes, rulers, and peoples, barratry, or negligence of the company's servants (whether on board the steamer or not), defect in the steamer, her machinery, gear, or fittings, or from any other cause of whatsoever nature."

The judge, upon these facts, found and ruled "that the contract was a British contract; that, by the English law, a carrier may by contract exempt himself from liability, even for loss caused by his negligence; that in this case, as the carrier has so attempted, and the terms are broad enough to exonerate him, the question remains of assent on the part of the plaintiff. This has been decided in Massachusetts to be a question of evidence, in which the *lex fori* is to govern; that although it has been decided that the law conclusively presumes that a consignor knows and assents to the terms of a bill of lading or a shipping receipt which he takes without dissent, yet a passenger ticket, even though it be called a 'contract ticket,' does not stand on the same footing, that in this case assent is not a conclu-

¹ *Acc. Roundtree v. Baker*, 52 Ill. 241. — Ed.

sion of law, and is not proved as a matter of fact." Upon the whole case, the judge ruled that the defendant company was not exempted from liability by the contract ticket, and found for the plaintiff.

If the rulings were wrong, the verdict was to be set aside, and judgment entered for the defendant; otherwise, the judgment was to be entered on the finding.¹

KNOWLTON, J. . . . We are of opinion that the ticket delivered to plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he assented to its provisions. All these provisions are equally binding on him as if he had read them.

The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy. *Greenwood v. Curtis*, 6 Mass. 358; *Forepaugh v. Delaware, Lackawanna, & Western Railroad*, 128 Penn. St. 217, and cases cited; *In re Missouri Steamship Co.*, 42 Ch. D. 321, 326, 327; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

*Judgment for the defendant.*²

THE KENSINGTON.

SUPREME COURT OF THE UNITED STATES. 1902.

[Reported 183 *United States*, 000.]

WHITE, J.³ The libel by which this action was commenced sought to recover the value of passengers' baggage which it was alleged the ship had wrongfully failed to deliver. The facts essential to be borne in mind, in order to approach the questions arising for decision, are as follows:—

The International Navigation Company, a New Jersey corporation, on December 6, 1897, at the office of its Paris agency, issued to Mrs. and Miss Bleecker, the wife and daughter of an officer of the United States Navy, a steamer ticket for a voyage from Antwerp to New York on the *Kensington*, a steamer in the control of the company, advertised to sail from Antwerp on December the 11th. The ticket was delivered to Mrs. Bleecker, who at the time made part payment of the passage money. The baggage of the two passengers was shipped by rail to Antwerp, to the care of the agent of the company there.

¹ The statement of facts has been condensed, and part of the opinion omitted. — ED.

² *Acc. Forepaugh v. Del. L. & W. R. R.*, 128 Pa, 217, printed *ante* Vol. I. p. 131. — ED.

³ Part of the opinion is omitted. — ED.

Mrs. Bleecker, at Antwerp, on the 10th of December, paid the remainder of the passage money, and it was entered on the ticket. The baggage having in the meanwhile been received, the charges which the agent at Antwerp had advanced were refunded and a receipt was issued. It was stated therein that the value of the baggage was unknown, and that it was shipped subject to the conditions contained in the company's steamer ticket and bill of lading. Mrs. Bleecker and her daughter embarked, and the steamer sailed on the 11th of December. The ticket was subsequently taken up by the purser.

The baggage was stowed in what was known as number 2, upper steerage deck. The voyage was an exceptionally rough one, the ship, encountering heavy seas and winds, rolled from 38 to 45 degrees on either side during the height of the gale, and was obliged to heave to for about fifteen hours. On arrival at New York the baggage was found to be totally destroyed. By constant shifting it had been reduced to an almost unrecognizable mass, was commingled with débris of broken china and straw, and covered with water. The first was occasioned by stowing crates of china in the same compartment. The presence of the water was explained by the fact that an exhaust pipe which passed through the compartment had been broken by the shifting of the contents of the compartment, and hence the exhaust escaped into the compartment.

There is no possible view which can be taken of the facts by which the loss of the baggage was brought about, by which the ship could be held responsible if the steamer ticket was in and of itself a complete contract, and all the conditions or exceptions legibly printed on the face thereof were lawful. The ticket was signed by the agent of the company at Paris, was countersigned by the agent at Antwerp, but was not signed by either Mrs. Bleecker or her daughter. One of the conditions printed on the ticket provided that there should be no liability to each passenger, "under any circumstances," beyond the sum of 250 francs, "at which such baggage is hereby valued," unless an increased value be declared and an additional sum paid as provided by the condition.

There was no proof tending to show that at the time the ticket was issued the attention of Mrs. Bleecker or her daughter was called to the fact that it embodied exceptional stipulations relieving the company from liability, or that such conditions were agreed to, except in so far as a meeting of minds on the subject may be inferred from the fact of the delivery of the ticket by the company, and its acceptance, and that it contained on its face, in small but legible type, among others, the stipulations which are relied upon. The testimony of Mrs. Bleecker and her daughter was that when the ticket was received it was put aside without reading it, and that it was not subsequently examined before it was delivered to the ship's officer. The District Court held that the loss of the baggage was attributable to bad stowage; that the ticket and the conditions printed on it were a contract binding upon

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the parties, so far as the conditions were lawful. The conditions generally relieving from liability for negligence were held to be void, but the stipulation as to the value of the baggage was held valid; recovery was allowed only for the equivalent of 250 francs to each. 88 Fed. 331.

On appeal the Circuit Court of Appeals for the Second Circuit affirmed the judgment. 36 C. C. A. 533, 94 Fed. 885.

The case by the allowance of a writ of certiorari is here for review.

The District Court held, although the condition of the weather might account for the shifting of the baggage, that result could also have arisen from its bad stowage; and, in the absence of all proof by the ship that the baggage had been properly stowed, when such proof was peculiarly within its reach, the loss must be presumed to have arisen from the imperfect stowage. The Circuit Court of Appeals, while in effect agreeing to this conclusion, in addition found that there was proof in the record tending to sustain the conclusion that the baggage had been improperly stowed, and that no proof even tending to rebut this testimony had been offered by the company. As in the argument at bar the conclusion of the court below on this subject was not seriously questioned, we content ourselves with saying that, as a matter of fact, we find them to be sustained, and therefore pass from their further consideration.

The loss of the baggage being, then, attributable to improper stowage, the question is, Was the vessel relieved from the consequence of its fault by the exceptions contained in the passenger ticket? The District Court decided "that a ticket of the character above described for a transatlantic passage is a unilateral contract, and, like a bill of lading, is binding upon the person who receives it, so far as its provisions are reasonable and valid." In other words, the court held, although there was no proof of the meeting of the minds of the parties upon the subject of exceptional limitations to be imposed upon the contract of carriage, the receipt and retention of the ticket implied a unilateral contract embracing the exceptions found in legible characters on the face of the ticket. And being thus a part of the express and written contract, the exceptions would be enforced, provided they were just and reasonable. The Circuit Court of Appeals in effect approved these views of the District Court.

While, apparently, the question whether there was a unilateral contract necessarily arises first for consideration, such is not the case when the situation of the record is taken into view. For should we, in disposing of this question, determine that the rulings of the court below as to the unilateral contract were correct, we would not thereby be relieved from deciding whether the conditions embodied in the contract were valid. On the other hand, should we conclude that the conditions relied on were void, there will be no occasion to determine the question of contract. We hence invert the logical order of consideration, and first come to determine whether the

conditions enumerated in the ticket relieved from the responsibility otherwise resulting from the bad stowage of the baggage. In doing so we shall, of course, assume, for the purpose of this branch of the case only, that the conditions relied upon were a part of a unilateral contract, and were binding as far as they were just and reasonable. It is apparent if the carrier, in transporting the baggage, was governed by the act of February 13, 1893, designated as the Harter Act, any provision in the ticket exempting from liability for fault in loading or stowage was void because inhibited by the express provisions of the statute. 27 Stat. at L. 445, chap. 105. As, however, the view which we take of the conditions expressed in the ticket will be equally decisive, whether or not the Harter Act concerns the carriage of passengers and their baggage, it becomes unnecessary to intimate any opinion as to whether the provisions of the act in question apply to such contracts. The exceptions found on the face of the ticket upon which the carrier depends are as follows :—

“(c) The shipowner or agent are not under any circumstances liable for loss, death, injury, or delay to the passenger or his baggage arising from the act of God, the public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not, perils of the seas, rivers, or navigation, accidents to or of machinery, boilers, or steam, collisions, strikes, arrest, or restraint of princes, courts of law, rulers, or people, or from any act, neglect, or default of the shipowner's servants, whether on board the steamer or not, or on board any other vessel belonging to the shipowner, either in matters aforesaid or otherwise howsoever. Neither the shipowner nor the agent is under any circumstances, or for any cause whatever or however arising, liable to an amount exceeding 250 francs for death, injury, or delay of or to any passenger carried under this ticket. The shipowner will use all reasonable means to send the steamer to sea in a seaworthy state and well-found, but does not warrant her seaworthiness.

“(d) The shipowner or agent shall not under any circumstances be liable for any loss or delay of or injury to passengers' baggage carried under this ticket, beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of 1 per cent, or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading, in use from the port of departure.”

It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of the *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 507,

and *Knott v. Botany Worsted Mills*, 179 U. S. 69, 71; where the previously adjudged cases are referred to, and the principles by them expounded are restated.

True it is that by the act of February 13, 1893 (27 Stat. at L. 445, chap. 105), known as the Harter Act, already adverted to, the general rule just above stated was modified so as to exempt vessels, when engaged in the classes of carriage coming within the terms of the statute, from liability for negligence in certain particulars. But while this statute changed the general rule in cases which the act embraced, it left such rule in all other cases unimpaired. Indeed, in view of the well-settled nature of the general rule at the time the statute was adopted, it must result that legislative approval was by clear implication given to the general rule as then existing in all cases where it was not changed.

Testing the exemptions found in the ticket by the rule of public policy, it is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or his servants. And seeking to accomplish these results, it is equally plain that the conditions were void if their legality be considered solely with reference to the modifications of the general rule created by the act of 1893. *Knott v. Botany Worsted Mills*, 179 U. S. 69. As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that "all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made," it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. *Story, Conf. L. §§ 38, 244*. While, as said in *Knott v. Botany Worsted Mills*, the previous decisions of this court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this court. In *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, the question arose whether conditions exempting a carrier from responsibility for loss caused by the neglect of himself or his servants could be

enforced in the courts of the United States, the bill of lading having been issued in New York by a British ship for goods consigned to England. Despite the fact that conditions exempting from responsibility for loss arising from negligence were valid by the laws of New York, and would have been upheld in the courts of that State, it was decided that, in view of the rule of public policy applied by the courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made, in one of the States of the Union. Nor is the suggestion that because there is no statute expressly prohibiting such contracts, and because it is assumed no offence against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to the contrary. The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion. The precise question has been carefully considered and decided in the district courts of the United States. In *The Guildhall*, 58 Fed. 796, it was held that a stipulation in a bill of lading issued at Rotterdam on goods destined to New York, exempting the carrier from liability for negligence, would not be enforced in the courts of the United States, although such a condition was valid under the law of Holland. In *The Glenmavis*, 69 Fed. 472, the same rule was applied to a bill of lading issued in Germany by a British ship, for goods consigned to Philadelphia. Indeed, by implication the question is controlled by statute. We have previously pointed out, under the assumption that the Harter Act does not apply to the carriage of the baggage of a passenger, that such law in effect affirms the rule of public policy as previously existing in the cases, where no change was made. But that act expressly prohibits carriers engaged in the business which it regulates from contracting, even in a foreign country, for a shipment to the United States, to relieve themselves from negligence in cases where the statute does not do so. *Knott v. Botany Worsted Mills*, 179 U. S. 69. The theory, then, by which alone the conditions relied on in this case can be enforced, despite the public policy which governs, in the courts of the United States, reduces itself to this: Carriers who transact a class of business where they are exempt by law, in many cases, from the consequences of the neglect of themselves or their servants, may not overthrow public policy by contracts made in a foreign country for a shipment to the United States; but carriers who are in no case exempt by the law from the consequence of their neglect may do so. But this amounts in last analysis to this: The lesser the immunity from negligence the greater the power to avoid the consequences of negligence.

The general exemptions from responsibility for negligence which the ticket embodies being controlled by the rule enforced in the courts of

the United States, and being therefore void, because against public policy, we come to consider the particular provisions contained in the ticket with reference to the value of the baggage and the limit of recovery, if any, arising therefrom. . . .

In view of the nature and duration of the voyage, of the circumstances which may be reasonably deemed to environ transatlantic cabin passengers, and the objects and purposes which it may also be justly assumed the persons who undertake such a voyage have in view, we think the arbitrary limitation of 250 francs to each passenger, unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment, was void. It is therefore unnecessary to decide whether the ticket delivered and received under circumstances disclosed by the record gave rise to a contract embracing the exceptions to the carrier's liability which were stated on the ticket. We intimate no opinion on the subject.

The decree below must be reversed, and the cause remanded to the District Court, with directions to ascertain the actual damage sustained by the libellants, and to enter a decree in their favor for the amount of such damages, with interest and costs.

And it is so ordered.

EMERY v. BURBANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1895.

[Reported 163 Massachusetts, 326.]

HOLMES, J. This is an action on an oral agreement, alleged to have been made in Maine, in 1890, by the defendant's testatrix, Mrs. Rumery, to the effect that, if the plaintiff would leave Maine and take care of Mrs. Rumery, the latter would leave the plaintiff all her property at her death, and also would put four thousand dollars into a house which the plaintiff should have. At the trial evidence was introduced tending to prove the agreement as alleged. The presiding justice ruled that the action could not be maintained, and the case is here on exceptions. As we are of opinion that the ruling must be sustained under St. 1888, c. 372, requiring agreements to make wills to be in writing, a fuller statement of the facts is not needful.

There is no doubt of the general principles to be applied. A contract valid where it is made is valid everywhere, but it is not necessarily enforceable everywhere. It may be contrary to the policy of the law of the forum. *Van Reimsdyk v. Kane*, 1 Gall. 371, 375; *Greenwood v. Curtis*, 6 Mass. 358; *Fant v. Miller*, 17 Grat. 47, 62. Or again, if the law of the forum requires a certain mode of proof, the contract, although valid, cannot be enforced in that jurisdiction without the proof required there. This is as true between the States of this

Union as it is between Massachusetts and England. *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 306; *Pritchard v. Norton*, 106 U. S. 124, 134; *Downer v. Chesebrough*, 36 Conn. 39; *Kleeman v. Collins*, 9 Bush (Ky.), 460; *Fant v. Miller*, 17 Grat. 47; *Hunt v. Jones*, 12 R. I. 262, 266; *Yates v. Thomson*, 3 Cl. & Fin. 544, 586, 587; *Bain v. Whitehaven & Furness Junction Railway*, 3 H. L. Cas. 1, 19; *Leroux v. Brown*, 12 C. B. 801. When the law involved is a statute, it is a question of construction whether the law is addressed to the necessary constituent elements, or legality, of the contract on the one hand, or to the evidence by which it shall be proved on the other. In the former case, the law affects contracts made within the jurisdiction, wherever sued, and may affect only them. *Drew v. Smith*, 59 Me. 393. In the latter, it applies to all suits within the jurisdiction, wherever the contracts sued upon were made, and again may have no other effect. It is possible, however, that a statute should affect both validity and remedy by express words, and this being so, it is possible that words which in terms speak only of one should carry with them an implication also as to the other. For instance, in a well-known English case *Maule, J.* said, "The fourth section of the statute of frauds entirely applies to procedure." And on this ground it was held that an action could not be maintained upon an oral contract made in France. But he went on, "It may be that the words used, operating on contracts made in England, renders them void." *Leroux v. Brown*, 12 C. B. 801, 805, 807. We cite the language, not for its particular application, but as a recognition of the possibility which we assert.

The words of the statute before us seem in the first place, and most plainly, to deal with the validity and form of the contract. "No agreement . . . shall be binding, unless such agreement is in writing." If taken literally, they are not satisfied by a written memorandum of the contract; the contract itself must be made in writing. They are limited, too, to agreements made after the passage of the act, a limitation which perhaps would be more likely to be inserted in a law concerning the form of a contract than in one which only changed a rule of evidence. But we are of opinion that the statute ought not to be limited to its operation on the form of contracts made in this State. The generality of the words alone, "no agreement," is not conclusive. But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practised without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicile of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts testators should be sued here upon such contracts without written evidence, wherever they are made.

If we are right in our understanding of the policy established by the legislature, it is our duty to carry it out so far as we can do so without coming into conflict with paramount principles. "If oral evidence

were offered which the *lex fori* excluded, such exclusion, being founded on the desire of preventing perjury, might claim to override any contrary rule of the *lex loci contractus*, not only on the ground of its being a question of procedure, but also because of that reservation in favor of any stringent domestic policy which controls all maxims of private international law." Westlake, Priv. Int. Law (3d. ed.), § 208; Wharton, Confl. Laws (2d. ed.), § 766.

In our view, the statute, whatever it expresses, implies a rule of procedure broad enough to cover this case. It is not necessary to decide exactly how broad the rule may be, — whether, for instance, if, by some unusual chance, a suit should happen to be brought here against an ancillary administrator upon a contract made in another State by one of its inhabitants, the contract would have to be in writing. The rule extends at least to contracts by Massachusetts testators. It might be possible to treat the words, "signed by the party whose executor or administrator is sought to be charged," as meaning "signed by the party whose executor or administrator is sought to be charged in Massachusetts," and to construe the whole statute as directed only to procedure. Compare *Fant v. Miller*, 17 Grat. 47, 72 *et seq.*; *Denny v. Williams*, 5 Allen, 1, 3, 9. Upon this question also we express no opinion. All that we decide is that the statute does apply to a case like the present.

The law of the testator's domicil is the law of the will. A contract to make a will means an effectual will, and therefore a will good by the law of the domicil. In a sense, the place of performance, as well as the forum for a suit in case of breach, is the domicil. We do not draw the conclusion that therefore the validity of all such contracts, wherever sued on, must depend on the law of the domicil. That would leave many such contracts in a state of indeterminate validity, until the testator's death, as he may change his domicil so long as he can travel. But the consideration shows that the final domicil is more concerned in the policy to be insisted on than any other jurisdiction, and justifies it in framing its rules accordingly. There would be no question to be argued if the law were in terms a rule of evidence. It is equally open for a State to declare, upon the same considerations which dictate a rule of evidence, that a contract must have certain form if it is to be enforced against its inhabitants in its courts. Legislation of this kind for contracts which thus necessarily reach into the jurisdiction in their operation hardly goes as far as statutes dealing with substantive liability which have been upheld. *Commonwealth v. Macloon*, 101 Mass. 1.

If the statute applies, the fact that the plaintiff has furnished the stipulated consideration will not prevent its application.

Exceptions overruled.

ARMSTRONG v. BEST.

SUPREME COURT OF NORTH CAROLINA. 1893.

[Reported 112 North Carolina, 59.]

CIVIL ACTION, heard before BRYAN, J., at January Term, 1892, of Wayne Superior Court, upon the following agreed statement of facts :

"It is agreed that at the time the goods for the purchase-money of which this action is brought were bought the plaintiffs were merchants, doing business in the city of Baltimore, in the State of Maryland, and the defendant L. C. Best was carrying on the trade of milliner and merchant in the city of Goldsboro, State of North Carolina, in her own name, as a licensed trader; that said goods were ordered by the defendant L. C. Best of the plaintiffs, and they were shipped by the plaintiffs to her from their place of business in the city of Baltimore, and were to be paid for by defendant L. C. Best at the end of sixty days; that at that time, and since, the defendant was and is a citizen and resident of the State of North Carolina, and a married woman, living with her husband, the defendant N. W. Best. The goods have not been paid for, except the credits set out in the accounts filed, and those not paid for were worth the agreed price of \$212.43; that the defendant has never been a free-trader under the statutes of North Carolina, and her husband has never consented in writing to the orders of said goods and to the sale thereof."

Judgment was rendered for defendants, and plaintiffs appealed.

SHEPHERD, C. J. If the contract, which is the subject of this action, was made in this State, it is well settled that it would be void by reason of the common law disability of the *feme* defendant to make any contract whatever upon which a personal judgment can be rendered against her, except in the cases provided by statute. *Pippen v. Wesson*, 74 N. C. 437; *Dougherty v. Sprinkle*, 88 N. C. 300; *Baker v. Garriss*, 108 N. C. 218; *Flaum v. Wallace*, 103 N. C. 296; *Farthing v. Shields*, 106 N. C. 289.

The plaintiffs, however, insist that the contract was made in the city of Baltimore, Maryland, their place of business, where they accepted the proposal of the defendant by shipping the goods according to her order. In this they are correct, for if a contract is completed in another State "it makes no difference in principle whether the citizen of this State goes in person or sends an agent or writes a letter across the boundary line between the two States." *Milliken v. Pratt*, 125 Mass. 374. As was said by Lord Lyndhurst: "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." *Pattison v. Mills*, 1 Dow. & Cl. 342. So if one in New York orders goods from Boston, "either by a carrier whom he points out or in the usual course of trade, this would be a completion, a making of the contract, and it

would be a Boston contract whether he gave no note or a note payable in Boston, or one without express place of payment." 2 Parsons' Con. 586.

The contract, then, being a Maryland contract, it is next insisted that it is one which a *feme covert* could have made in that State, and therefore enforceable in the courts of North Carolina. We are by no means certain that the present contract is a valid one according to the laws of Maryland, as the statute of that State seems to recognize the legal capacity of a married woman only to the extent of contracting with reference to property acquired by her "skill, industry, or personal labor." Assuming, however, that it is a valid contract in Maryland, we will proceed to the examination of the question whether it should be enforced by the courts of this State.

It is well settled that the law of one State has *proprio vigore* no force or authority beyond the jurisdiction of its own courts, and that whatever effect is given to it by the courts of foreign countries or other States is the result of that international comity (more properly called private international law) which is the product of modern civilization. *Hornthall v. Burwell*, 109 N. C. 10. It is left to each State or nation to say how far it will recognize this comity and to what extent it will be permitted to control its own laws. It has, however, been very generally settled that all matters bearing upon the execution, the interpretation, and the validity of a contract are to be determined by the law of the place where the contract is made, and if valid there it is valid everywhere. *Taylor v. Sharp*, 108 N. C. 377. An exception is maintained by some of the continental jurists as to the capacity of a contracting party, and they generally hold that the incapacity of the domicil attaches to and follows the person wherever he may go. We remarked in *Taylor v. Sharp*, *supra*, that this was not considered by Mr. Justice Story (*Conflict Laws*, 103, 104) as the doctrine of the common law, and we also stated the conclusion of Gray, C. J., in *Milliken v. Pratt*, *supra*, that the general current of the English and American authorities is in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not under the law of the domicil be deemed capable of making it. The proposition, though denied by Dr. Wharton as to infants and *femes covert* (*Conflict of Laws*, 112, 118), seems to be generally accepted in this country in so far as it relates to the enforcement of contracts in courts other than those of the domicil. If, for example, the plaintiffs were suing upon the present contract in the courts of Maryland, the defendant could not, it is thought, avail herself of the incapacity of her domicil, but the *lex loci contractus* would prevail. But quite a different question is presented when the action is brought in the forum of the domicil. In such a case a very important qualification of private international law is to be considered, and this is that no State or nation will enforce a foreign law which is contrary to its fixed and settled policy. In *Bank*

of *Augusta v. Earle*, 13 Pet. 519, Chief Justice Taney, speaking for the court, said: "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests." To the same effect is the language of Story, that no State will enforce a foreign law if it be "repugnant to its policy or prejudicial to its interests." Conflict of Laws, 37. That this qualifying principle is applicable to cases like the present is manifest, not only by reason and necessity, but also by the decisions of other courts. Even in *Milliken v. Pratt*, *supra*, in which the *lex loci contractus* is pushed to the extreme limit, it is suggested that where the incapacity of a married woman is the settled policy of the State "for the protection of its own citizens, it could not be held by the courts of that State to yield to the law of another State in which she might undertake to contract."

In *Robertson v. Queen*, 87 Tenn. 445, the contract was made by the *feme* defendant in Kentucky, where she resided and under whose laws she was capable of contracting. An action was brought in Tennessee, and the court held, as we did in the similar cases of *Sharp v. Taylor*, *supra*, and *Wood v. Wheeler*, 111 N. C. 231, that the plaintiff was entitled to recover. The court, however, said: "If this were a suit against a married woman, a citizen of this State, on a contract made out of the State, there would be much force in the insistence of the defendant."

In *Johnson v. Gawtry*, 11 Mo. App. 322, it was held that where a married woman, having a separate estate in land in Missouri, makes a contract in another State, her capacity to make the contract and its validity are to be determined by the law of Missouri, in a suit in a Missouri court to enforce such contract.

In *Bank v. Williams*, 46 Miss. 618, the contract was made in Louisiana, where it would have been valid against the *feme* defendant. The suit was brought in Mississippi, the place of her domicil, and under whose laws the contract was void by reason of her coverture. The opinion of the court is very elaborate, and, although the special character of the Louisiana law is referred to, it is believed that its reasoning is of general application. The court said: "It is the prerogative of the sovereignty of every country to define the conditions of its members, not merely its resident inhabitants, but others temporarily there, as to capacity and incapacity. But capacity or incapacity, as to acts done in a foreign country where the person may be temporarily, will be recognized as valid or not in the forum of his domicil, as they may infringe or not its interests, laws, and policies." After speaking of the separate estate of the wife and the statutes prescribing how it may be charged, the court, referring to the foreign plaintiff, says: "But he must satisfy the court that his debt was such a charge upon her estate, or its income, as she had the power to make; otherwise, it would be a violation of the tenure, the conditions of her title, to allow

him to subject it. But the creditor may say, 'I cannot bring this debt within the terms defined by your law; nevertheless, it was such a contract as a married woman could make by the law of Louisiana. Comity requires your courts to treat the contract precisely as Louisiana would, and I demand a judgment against the wife.' 'No,' says the court, 'you cannot get here any fruit of a judgment; there is nothing subject to its payment, and our law affords no remedy against a married woman in any of its courts, law or equity, except through a property which she has, and which must be pointed out by the creditor. We know of no such thing as a personal obligation, aside from and independent of a property which may discharge it.'"

In North Carolina it has been conclusively determined that the common law disability of a *feme covert* still obtains, and that, except in the cases provided by statute, her promise, as was said by Ruffin, J., is "as void as it ever was, with no power in any court to proceed to judgment against her *in personam*." *Dougherty v. Sprinkle, supra*. The Constitution and laws made in pursuance thereof protect her separate estate and prescribe the manner in which she may dispose of or charge it, and the assent of the husband is generally necessary.

This brief reference to our laws in respect to married women is sufficient to show that the enforcement of the present contract is wholly repugnant to our domestic policy, as well as prejudicial to the interests of our citizens. It is not pretended that the defendant has attempted to charge her separate estate in any manner provided by our laws, and to hold that she may subject it to execution upon a personal judgment, by reason of a promise made during a short visit to another State, or, as in this case, by a simple order for goods, would afford an easy method of charging her property in contravention of the public policy and laws of the domicil. It is further to be observed that in North Carolina, as a general rule, the written assent of the husband is necessary in order to give any effect whatever to her obligations, yet this wholesome provision may easily be evaded, even in the very presence of the husband and despite his protest, by a simple correspondence by the wife with parties in another State, which may technically amount to a foreign contract. In this way she could indirectly dispose of or charge all of her real or personal property, entirely freed from the restraint of her husband, or the methods prescribed by the *lex rei situs*. We cannot assent to the proposition that a foreign law, thus introduced and so utterly subversive of the laws regulating a large amount of property within the limits of this State, will be recognized and enforced by our courts.

The courts of our State have perfect jurisdiction over all personal and real property within its limits belonging to the wife, and if our laws in respect to the manner in which it may be charged conflict with those of another State, it cannot be made a question in our own courts as to which shall prevail. It is certainly competent for any State to adopt laws to protect its own property as well as to regulate it, and

“no nation,” says Story, “will suffer the laws of another to interfere with her own to the injury of her citizens. That whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions. . . . That whenever a doubt does exist, the court which decides will prefer the laws of its own country to that of the stranger.” Conflict of Laws, 28.

For the reasons given, we cannot recognize the present contract as an enforceable one in our courts.

We think his Honor was correct in his ruling that the plaintiffs were not entitled to recover.

*Affirmed.*¹

POLSON v. STEWART.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1897.

[Reported 167 Massachusetts, 211.]

HOLMES, J. This is a bill to enforce a covenant made by the defendant to his wife, the plaintiff's intestate, in North Carolina, to surrender all his marital rights in certain land of hers. The land is in Massachusetts. The parties to the covenant were domiciled in North Carolina. According to the bill, the wife took steps which under the North Carolina statutes gave her the right to contract as a *feme sole* with her husband as well as with others, and afterwards released her dower in the defendant's lands. In consideration of this release, and to induce his wife to forbear suing for divorce, for which she had just cause, and for other adequate considerations, the defendant executed the covenant. The defendant demurs.

The argument in support of the demurrer goes a little further than is open on the allegations of the bill. It suggests that the instrument which made the wife a “free trader,” in the language of the statute, did not go into effect until after the execution of the release of dower and of the defendant's covenant. But the allegation is that the last mentioned two deeds were executed after the wife became a free trader, as they probably were in fact, notwithstanding their bearing date earlier than the registration of the free trader instrument. We must assume that at the date of their dealings together the defendant and his wife had as large a freedom to contract together as the laws of their domicil could give them.

But it is said that the laws of the parties' domicil could not authorize a contract between them as to lands in Massachusetts. Obviously this is not true. It is true that the laws of other States cannot render valid conveyances of property within our borders which our laws say

¹ *Acc. Thompson v. Taylor*, 65 N. J. L. 107, 46 Atl. 567. — Ed.

are void, for the plain reason that we have exclusive power over the *res*. *Ross v. Ross*, 129 Mass. 243, 246; *Hallgarten v. Oldham*, 135 Mass. 1, 7, 8. But the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract. Such precedents as there are, are on the same side. The most important intimations to the contrary which we have seen are a brief note in Story, *Conf. of Laws*, § 436, note, and the doubts expressed in Mr. Dicey's very able and valuable book. Lord Cottenham stated and enforced the rule in the clearest way in *Ex parte Pollard*, 4 Deac. 27, 40 *et seq.*; s. c. Mont. & Ch. 239, 250. So Lord Romilly in *Cood v. Cood*, 33 Beav. 314, 322. So in Scotland, in a case like the present, where the contract enforced was the wife's. *Findlater v. Seafeld*, Faculty Decisions, 553, Feb. 8, 1814. See also *Cuninghame v. Semple*, 11 Morison, 4462; *Erskine*, Inst. Bk. 3, tit. 2, § 40; *Westlake*, Priv. Int. Law (3d ed.), § 172; *Rorer*, Interstate Law (2d ed.), 289, 290.

If valid by the law of North Carolina there is no reason why the contract should not be enforced here. The general principle is familiar. Without considering the argument addressed to us that such a contract would have been good in equity if made here (*Holmes v. Winchester*, 133 Mass. 140; *Jones v. Clifton*, 101 U. S. 225; and *Bean v. Patterson*, 122 U. S. 496, 499), we see no ground of policy for an exception. The statutory limits which have been found to the power of a wife to release dower (*Mason v. Mason*, 140 Mass. 63, and *Peaslee v. Peaslee*, 147 Mass. 171, 181) do not prevent a husband from making a valid covenant that he will not claim marital rights with any person competent to receive a covenant from him. *Charles v. Charles*, 8 Grat. 486; *Logan v. Birkett*, 1 Myl. & K. 220; *Marshall v. Beall*, 6 How. 70. The competency of the wife to receive the covenant is established by the law of her domicil and of the place of the contract. The laws of Massachusetts do not make it impossible for him specifically to perform his undertaking. He can give a release which will be good by Massachusetts law. If it be said that the rights of the administrator are only derivative from the wife, we agree, and we do not for a moment regard any one as privy to the contract except as representing the wife. But if then it be asked whether she could have enforced the contract during her life, an answer in the affirmative is made easy by considering exactly what the defendant undertook to do. So far as occurs to us, he undertook three things: first, not to disturb his wife's enjoyment while she kept her property; secondly, to execute whatever instrument was necessary in order to release his rights if she conveyed; and thirdly, to claim no

rights on her death, but to do whatever was necessary to clear the title from such rights then. All these things were as capable of performance in Massachusetts as they would have been in North Carolina. Indeed, all the purposes of the covenant could have been secured at once in the lifetime of the wife by a joint conveyance of the property to a trustee upon trusts properly limited. It will be seen that the case does not raise the question as to what the common law and the presumed law of North Carolina would be as to a North Carolina contract calling for acts in Massachusetts, or concerning property in Massachusetts, which could not be done consistently with Massachusetts law.

With regard to the construction of the defendant's covenant we have no doubt. It is "to surrender, convey, and transfer to said Kitty T. Polson Stewart, Jr., and her heirs, all the rights of him, the said Henry Stewart, Jr., in and to the lands and property above described, which he may have acquired by reason of the aforesaid marriage, and the said Kitty T. Polson Stewart, Jr., is to have the full and absolute control and possession of all of said property free and discharged of all the rights, claims, or demands of every nature whatsoever of the said Henry Stewart, Jr." Notwithstanding the decision of the majority in *Rochon v. Lecatt*, 2 Stew. (Ala.) 429, we think that it would be quibbling with the manifest intent to put an end to all claims of the defendant if we were to distinguish between vested rights which had and those which had not yet become estates in the land, or between claims during the life of the wife and claims after her death. It is plain, too, that the words import a covenant for such further assurance as may be necessary to carry out the manifest object of the deed. See *Marshall v. Beall*, 6 How. 70; *Ward v. Thompson*, 6 Gill & Johns. 349; *Hutchins v. Dixon*, 11 Md. 29; *Hamrico v. Laird*, 10 Yerger, 222; *Mason v. Deese*, 30 Ga. 308; *McLeod v. Board*, 30 Tex. 238.

Objections are urged against the consideration. The instrument is alleged to have been a covenant. It is set forth, and mentions one dollar as the consideration. But the bill alleges others, to which we have referred. It is argued that one of them, forbearance to bring a well-founded suit for divorce, was illegal. The judgment of the majority in *Merrill v. Peaslee*, 146 Mass. 460, 463, expressly guarded itself against sanctioning such a notion, and decisions of the greatest weight referred to in that case show that such a consideration is both sufficient and legal. *Newsome v. Newsome*, L. R. 2 P. & D. 306, 312; *Wilson v. Wilson*, 1 H. L. Cas. 538, 574; *Besant v. Wood*, 12 Ch. D. 605, 622; *Hart v. Hart*, 18 Ch. D. 670, 685; *Adams v. Adams*, 91 N. Y. 381; *Sterling v. Sterling*, 12 Ga. 201. Then it is said that the wife's agreement in bar of her dower was invalid, because it had not the certificate that she had been examined, etc., as required by the North Carolina statutes annexed to the bill. Whether it was invalid or not, the defendant was content with it, and accepted the

execution of it as a consideration. This being so, it would be hard to say that it was not one, even if without legal effect. Whether void or not, it is alleged to have been performed; and finally, if it was void, it was void on its face, as matter of law, and the husband must be taken to have known it, so that the most that could be done would be to disregard it; if that were done, the other considerations would be sufficient. See *Jones v. Waite*, 5 Bing. N. C. 341, 351.

Demurrer overruled.

FIELD, C. J. I cannot assent to the opinion of a majority of the court. By our law husband and wife are under a general disability or incapacity to make contracts with each other. The decision in *Whitney v. Closson*, 138 Mass. 49, shows, I think, that the contract sued on would not be enforced if the husband and wife had been domiciled in Massachusetts when it was made. As a conveyance made directly between husband and wife of an interest in Massachusetts land would be void although the parties were domiciled in North Carolina when it was made, and by the laws of North Carolina were authorized to make such a conveyance, so I think that a contract for such a conveyance between the same persons also would be void. It seems to me illogical to say that we will not permit a conveyance of Massachusetts land directly between husband and wife, wherever they may have their domicil, and yet say that they may make a contract to convey such land from one to the other which our courts will specifically enforce. It is possible to abandon the rule of *lex rei sitæ*, but to keep it for conveyances of land and to abandon it for contracts to convey land seems to me unwarrantable.

The question of the validity of a mortgage of land in this Commonwealth is to be decided by the law here, although the mortgage was executed elsewhere where the parties resided, and would have been void if upon land there situated. *Goddard v. Sawyer*, 9 Allen, 78. "It is a settled principle, that 'the title to, and the disposition of, real estate must be exclusively regulated by the law of the place in which it is situated.'" *Cutter v. Davenport*, 1 Pick. 81; *Osborn v. Adams*, 18 Pick. 245. The testamentary execution of a power of appointment given by will in relation to land is governed by the *lex situs*, or the law of the domicil of the donor of the power. *Sewall v. Wilmer*, 132 Mass. 131.

The plaintiff, merely as administrator, cannot maintain the bill. *Caverly v. Simpson*, 132 Mass. 462, 464. The plaintiff must proceed on the ground that Mrs. Henry Stewart, Jr., acquired by the instruments executed in North Carolina the right to have conveyed or released to her and her heirs by her husband all the interest he had as her husband in her lands in Massachusetts; that this right descended on her death to her heirs, according to the law of Massachusetts; and that the plaintiff, being an heir, has acquired the interest of the other heirs, and therefore brings the bill as owner of

this right. The plaintiff, as heir, claims by descent from Mrs. Stewart, and if the contract sued on is void as to her, it is void as to him.

It is only on the ground that the contract conveyed an equitable title that the plaintiff as heir has any standing in court. His counsel founds his argument on the distinction between a conveyance of the legal title to land and a contract to convey it. If the instrument relied on purported to convey the legal title, his counsel in effect admits that it would be void by our law. He accepts the doctrine stated in *Ross v. Ross*, 129 Mass. 243, 246, as follows: "And the validity of any transfer of real estate by act of the owner, whether *inter vivos* or by will, is to be determined, even as regards the capacity of the grantor or testator, by the law of the State in which the land is situated." As a contract purporting to convey a right in equity to obtain the legal title to land, he contends that it is valid. I do not dispute the cases cited with reference to contracts concerning personal property, but the rule at common law in regard to the capacity of parties to make contracts concerning real property, as I read the cases and text-books, is that the *lex situs* governs. *Cochran v. Benton*, 126 Ind. 58; *Doyle v. McGuire*, 38 Ia. 410; *Sell v. Miller*, 11 Ohio St. 331; *Johnston v. Gawtry*, 11 Mo. App. 322; *Frierson v. Williams*, 57 Miss. 451.

Dicey on the Conflict of Laws is the latest text-book on the subject. He states the rule as follows:—

Page lxxxix. "(B). Validity of Contract. (i) Capacity.

"Rule 146. Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of the making of the contract.

"(1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid.

"(2) If he has not such capacity by that law, the contract is invalid.

"Exception 1. A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (*lex loci contractus*) [?].

"Exception 2. A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs*."

Page xcii. "(A). Contracts with regard to Immovables.

"Rule 151. The effect of a contract with regard to an immovable is governed by the proper law of the contract [?].

"The proper law of such contract is, in general, the law of the country where the immovable is situate (*lex situs*)."

On page 517 *et seq.* he states the law in the same way, with numerous illustrations, but with some hesitation as to the law governing the form of contracts to convey immovables. See page xc., Rule 147, Exception 1. For American notes with cases, see page 527 *et seq.* In the Appendix, page 769, note (B), he discusses the subject at length, and with the same result. Some of the cases cited are the

following: Succession of Larendon, 39 La. An. 952; Besse v. Pellochoux, 73 Ill. 285; Fuss v. Fuss, 24 Wis. 256; Moore v. Church, 70 Ia. 208; Heine v. Mechanics & Traders Ins. Co. 45 La. An. 770; First National Bank of Attleboro v. Hughes, 10 Mo. App. 7; Ordranax v. Rey, 2 Sandf. Ch. 33; Adams v. Clutterbuck, 10 Q. B. D. 403; Chapman v. Robertson, 6 Paige, 627, 630.

Phillimore in 4 Int. Law (3d ed.), 596, states the law as follows:—

“DCCXXXV. 1. The case of a contract respecting the *transfer* of immovable property illustrates the variety of the rules which the foreign writers upon private international law consider applicable to a contract to which a foreigner is a party: they say that,

“i. The capacity of the obligor to enter into the contract is determined by reference to the law of his domicile.

“ii. The like capacity of the obligee by the law of *his* domicile.

“iii. The mode of alienation or acquisition of the immovable property is to be governed by the law of the situation of that property.

“iv. The external form of the contract is to be governed by the law of the place in which the contract is made.

“It is even suggested by Fœlix, that sometimes the *interpretation* of the contract may require the application of a fifth law.

“DCCXXXVI. The Law of England, and the Law of the North American United States, require the application of the *lex rei sitæ* to all the four predicaments mentioned in the last section.

“DCCXXXVII. But a distinction is to be taken between contracts to transfer property and the contracts by which it is transferred. The former are valid if executed according to the *lex loci contractus*; the latter require for their validity a compliance with the forms prescribed by the *lex rei sitæ*. Without this compliance the *dominium* in the property will not pass.”

To the same effect as to the capacity of the parties are Rattigan, Priv. Int. Law, 128; Whart. Conf. of Laws (2d ed.), § 296; Story, Conf. of Laws (8th ed.), §§ 424–431, 435; Rorer, Interstate Law, 263; Nelson, Priv. Int. Law, 147, 260. See Westlake, Priv. Int. Law (3d ed.), §§ 156, 167 *et seq.*

On reason and authority I think it cannot be held that, although a deed between a husband and his wife, domiciled in North Carolina, of the rights of each in the lands of the other in Massachusetts, is void as a conveyance by reason of the incapacity of the parties under the law of Massachusetts to make and receive such a conveyance to and from each other, yet, if there are covenants in the deed to make a good title, the covenants can be specifically enforced by our courts, and a conveyance compelled, which, if voluntarily made between the parties, would be void.

I doubt if all of the instruments relied on have been executed in accordance with the statutes of North Carolina. By section 1828 of the statutes of that State set out in the papers, the wife became a free trader from the time of registration. This I understand is January

7, 1893. Exhibit B purports to have been executed before that time, to wit, January 4, 1893. There does not appear to have been any examination of the wife separate and apart from her husband, as required by section 1835. If Exhibit B fails, there is at least a partial failure of consideration for Exhibit C. It is said that an additional consideration is alleged, viz. the wife's forbearing to bring a suit for divorce. Whether this last is a sufficient consideration for a contract I do not consider. It is plain enough that there was an attempt on the part of the husband and wife to continue to live separate and apart from each other without divorce, and to release to each other all the property rights each had in the property of the other. If the release of one fails, I think that this court should not specifically enforce the release of the other; mutuality in this respect is of the essence of the transaction. If the husband owned lands in Massachusetts, and had died before his wife, I do not think that Exhibit B, even if it were executed according to the statutes of North Carolina, and the wife duly examined and a certificate thereof duly made, would bar her of her dower. Our statutes provide how dower may be barred. Pub. Sts. c. 124, §§ 6-9. Exhibit B is not within the statute. See *Mason v. Mason*, 140 Mass. 63. Antenuptial contracts have been enforced here in equity so as to operate as a bar of dower, even if they did not constitute a legal bar. *Jenkins v. Holt*, 109 Mass. 261. But postnuptial contracts, so far as I am aware, never have been enforced here so as to bar dower, unless they conform to the statutes. *Whitney v. Closson*, 138 Mass. 49. Whatever may be true of contracts between husband and wife made in or when they are domiciled in other jurisdictions, so far as personal property or personal liability is concerned, I think that contracts affecting the title to real property situate within the Commonwealth should be such as are authorized by our laws. I am of opinion that the bill should be dismissed.

DELAUNAY v. THE LONDON AND PROVINCIAL MARINE INSURANCE CO.

TRIBUNAL OF COMMERCE OF THE SEINE. 1897.

[*Reported 26 Clunet*, 340.]

THE TRIBUNAL. Delaunay sues the London and Provincial Marine Insurance Company for the sum of 12,625 francs, the amount of the risk covered by the defendant on the ship "Ocean," which was burned at sea on a voyage from Dakar to Réunion. The plaintiff alleges that this insurance was written at London, upon his order and account, by Mautin, a sworn marine insurance broker at Paris, and that the policy contains the following clause: "It is declared and agreed by these

presents that in case of loss the policy hereto annexed, No. 566,827, dated December 28, 1895, shall be considered as sufficient proof of full and entire interest."

Delaunay claims and pleads that it is here immaterial that there is no insurable interest in France, and that, contrary to the provisions of the French law, it names the broker as dealing for himself, his representatives, and all persons in interest. The policy was written in England in conformity with English rules and usages with respect to marine insurance, for an object permitted by the English law; and the insurer therefore should not invoke the French law in order to refuse to fulfil the obligation contracted by him toward the assured.

It is admitted, however, that Delaunay is neither owner of the vessel, nor a creditor with a lien upon it in whole or in part, nor owner of any part of the cargo of the ship "Ocean," nor has he any lien upon the freight; but he claims to be a creditor of the owner, having become so before the vessel set sail. Delaunay states in his argument at the bar, that the debt being secured only by the freight (since the vessel was hypothecated) this security was strengthened by contracting on his own account an insurance on the safe arrival, on the supposition that the failure of the vessel to arrive at destination would jeopardize his debt by depriving his debtor of the sums due for freight.

It is here a question of the execution of a contract of marine insurance. The essence of such a contract is to secure the assured against the risks of navigation. The insurer, in consideration of the payment of a premium, engages to indemnify the assured against the loss which he may experience by the destruction of something exposed for a certain term to the fortune of the sea. It is true that a Frenchman who contracts abroad whether as insurer or as insured, submits to the law of that country, and cannot, when sued in France, invoke the French law as the law of his obligation; but this is always subject to the condition that the policy contain nothing contrary to the public policy of France in matters of insurance. This condition determines the question, and it would be premature to examine the other points raised by the parties before deciding whether the principles of public policy as established in France have been respected or violated in the contract submitted to the judgment of the court. There is nothing to prevent a creditor, in exercise of the right conferred on him by article 1166 of the Civil Code, from doing an act to preserve the property of his debtor, but the act must be done in the name of the debtor. In maritime practice, insurance may be taken out by the assured himself or by a third person acting on account of the assured or on account of whom it may concern, which must be expressed in the policy; but in any case public policy forbids insuring anything but maritime risks. In this case Delaunay has not insured in his debtor's name any part whatsoever of his property exposed to maritime risk. The object of his insurance, according to his own statement, was to secure the payment of a debt, a debt absolutely due him in any state of the case, whatever the fate of

the vessel during the voyage. The loss of this vessel, involving the payment of the insurance, did not even result, by virtue of the contract, in transferring to the insurer rights of the assured in the thing insured, any more than in discharging the debtor. Such insurance is contrary to public policy in France.

Consequently, without going into the question whether the contract was regularly made in England and in conformity with her laws by Mautin, acting by order of and on account of Delaunay, it is sufficient to say that the suit brought in this court for this purpose will not lie, and should be dismissed.

